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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
HONORABLE WINTON MC KIBBEN, JUDGE PRO TEM PRESIDING  
DEPARTMENT X-5

---oOo---

MILTON J. HOROWITZ, et al.,  
Plaintiffs,

vs. No. 965245

RAYBESTOS-MANHATTAN, et al.,  
Defendants./

REPORTER'S TRANSCRIPT OF PROCEEDINGS AUGUST 16, 1995  
JURY TRIAL

A P P E A R A N C E S

For the Plaintiffs: WARTNICK, CHABER, HAROWITZ, SMITH &  
TIGERMAN

By: MADELYN J. CHABER, Attorney at Law

For the Defendants: PREUSS, WALKER & SHANAGHER

By: CYNTHIA C. ROENISCH, Attorney at Law

SHOOK, HARDY, & BACON By: WILLIAM S. OHLEMEYER, Attorney  
at Law

FENTON & KELLER

By: RONALD F. SCHOLL, Attorney at Law

NUTTER, MC CLENNEN & FISH By: STEPHEN J. BRAKE, Attorney  
at Law

REPORTED BY: JOANNE M. FARRELL, CSR NO. 4838  
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PLAINTIFFS' EXHIBITS

NO.	IDENTIFICATION	IN EVIDENCE
28	1039	
29	1040	1040
30	1114	1115
31	1114	1117
32	1114	1115
33	1114	1117

19 34 1114 1117  
35 1114 1117  
20 36 1114 1117  
37 - 41 1152 1152

21  
22

DEFENDANTS' EXHIBITS

23  
24 NO. IDENTIFICATION IN EVIDENCE  
C - F 1058 1094  
25 G 1170 1172  
H 1172 1177

26  
27 ---o0o---  
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1 P R O C E E D I N G S  
2 (In open court outside the presence of the jury.)  
3 THE COURT: Good morning.  
4 MS. CHABER: Your Honor, let me get the Court some  
5 depositions.  
6 THE COURT: Let me start by returning these copies of  
7 medical records that you gave me last night, Ms. Chaber.  
8 I've looked at them, and it seems to me they are all of a  
9 personal nature and will not lead to admissible evidence.  
I  
10 don't believe they will be enlightening in any way to the  
11 defense.  
12 MR. BRAKE: Thank you, Your Honor.  
13 THE COURT: It might satisfy curiosity, but that's  
14 all.  
15 MS. CHABER: And the Court then would sustain  
16 plaintiffs' objection to producing these to the  
defendants?  
17 THE COURT: Yes; correct.  
18 MS. CHABER: Thank you, Your Honor.  
19 Your Honor, there are some designations I'd like to  
20 give you, and we can start out with the Comproni  
deposition.  
21 May I hand them up to you?  
22 THE COURT: Sure. We will mark them later.  
23 MS. CHABER: They have actually been filed.  
24 THE COURT: All right.  
25 MR. BRAKE: And we have, predictably,  
26 counter-designations and objections to some of them. What  
I  
27 did, Your Honor -- whichever is Your Honor's preference --  
I  
28 took the transcript and marked just the portions I was  
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1 objecting to, but maybe if Ms. Chaber marked the whole  
2 thing, we can go into the objections and work off her set.  
3 MS. CHABER: There's two volumes, Your Honor. I'll  
4 give you the second volume. But before we get to that  
5 matter, Your Honor, there were a couple of -- and I guess  
we  
6 could do it afterwards -- but there were a couple things I  
7 wanted to raise before Dr. Horn came back and before my

8 client's testimony, which will follow Dr. Horn's.  
9 One is that during the -- let's see how to phrase  
10 this. My client lives in [DELETED], lives in a section  
of  
11 [DELETED]. I believe, and if I'm  
12 incorrect about this, then it's not an issue, that counsel  
13 intends to cross-examine Dr. Horn, as well as Dr.  
Horowitz,  
14 with sort of an implication that there's something wrong  
or  
15 improper about filing this case up here in San Francisco  
16 rather than in [DELETED].  
17 There was never any motion to change venue made and  
18 the case is properly filed here. There's never been any  
19 motion contending that it wasn't. And I think that it  
would  
20 be improper to allow the impermissible inference to be  
drawn  
21 that somehow this is somewhat suspect.  
22 The questioning that took place at Dr. Horn's  
23 deposition -- and again, if this isn't going to be, then  
24 it's not necessary to raise it -- went along the lines of  
25 you: Don't regularly see patients from [DELETED], do  
26 you? And: Doctors from [DELETED] don't regularly  
refer  
27 you patients, and implications in Dr. Horowitz's, my  
28 client's, deposition that, you know, all the witnesses  
were

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1 down in [DELETED]  
2 I just think that it would be improper to be raising  
3 that as something. It's not relevant to the issues that we  
4 are here on. We are either in the proper court or we are  
5 not. The issue of being in the proper court was never  
6 raised, and I would ask the Court for a caution to  
7 defendants not to engage in that type of questioning of the  
8 witnesses.  
9 THE COURT: Any response from the defendants?  
10 MR. OHLEMEYER: Well, Your Honor, I'm not trying to  
be  
11 facetious, I'm not quite sure what Counsel's asking for.  
12 The fact that Dr. Horowitz lives in [DELETED] and the  
13 fact that Dr. Horn practices in Oakland, and the genesis  
of  
14 the lawsuit, how Dr. Horowitz went from [DELETED] to  
15 Oakland to see Dr. Horn, and all that, is a fact that is  
16 relevant to some of the issues in this lawsuit.  
17 I don't intend to suggest to Dr. Horowitz that he  
18 should have filed his lawsuit in [DELETED], but by the  
19 same token, I don't think I should be precluded from  
20 eliciting facts from the Doctor, or Dr. Horn, as to the  
21 respective geography and how they all got together.  
22 The fact is, Dr. Horn is not one of his treating  
23 physicians. Dr. Horn was hired by Ms. Chaber's firm to  
24 interview and review Dr. Horowitz's medical records, and  
the  
25 fact that Dr. Horn doesn't typically do that, either by  
26 referrals from doctors in Los Angeles or by practice is  
part  
27 of the information this jury should be allowed to hear in  
28 determining whether Dr. Horn is credible, Dr. Horowitz is

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1 credible, and whether the lawsuit -- the genesis and  
2 progression of the lawsuit is all relevant to the  
3 credibility and other issues the jury has to decide.

4 THE COURT: Can't you just simply ask him -- I assume  
5 that he was hired as an expert by the firm. What's wrong  
6 with that? You can ask that question, but I don't know  
that

7 an undue emphasis should be placed on the relative  
8 geographical positions of where they are. It doesn't have  
9 any significance.

10 MR. OHLEMEYER: Your Honor, I maintain that it does,  
11 and I think at the end of the case, you'll see why. But  
are  
12 you telling me I can't ask --

13 THE COURT: I didn't say that. I said I think that  
it  
14 should not be emphasized. And I think you can ask an  
15 appropriate question, but it shouldn't be dwelled upon.

It  
16 happens all the time, that law firms refer clients to  
17 experts for an evaluation, doesn't it?

18 MR. OHLEMEYER: Sure it does.

19 THE COURT: There's nothing wrong with that. A  
20 typical question is: Who hired you?

21 MS. CHABER: And I'm not contending that he can't do  
22 that, Your Honor.

23 THE COURT: I understand.

24 MS. CHABER: I brought that out on direct  
examination.

25 That's not the import of what I'm saying.

26 THE COURT: I can't foresee all the questions and  
27 answers that are going to be forthcoming. Just don't  
unduly

28 dwell upon the geographical position of the parties,  
unless

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1 it has some real significance.

2 If its purpose -- or, it seems to me, that it could  
be

3 prejudicial if it's dwelled upon, and I don't know what the  
4 implication will be from the jury, but you know, people are  
5 sophisticated, and sometimes they have -- there are  
6 speculations that arise as a result of something that has  
no

7 real foundation. I don't know why he did it and it doesn't  
8 matter to us, really, why he filed here, whether it's a  
9 friendship in somebody in the law firm or something else,  
or

10 a friend up here who said: You've got to get this law  
firm.

11 You've got to get this doctor. That happens.

12 But why dwell on it? The issue is: Has the  
plaintiff

13 suffered as a result of some conduct of the defendants?

14 That's the issue.

15 MS. CHABER: That raises --

16 MR. OHLEMEYER: And in deciding that issue, Your  
17 Honor, the rules of evidence give me wide latitude in

18 bringing any matter that has an effect --  
19 THE COURT: I agree with that, and I intend to allow  
20 it. But I'm just saying don't dwell on it, that's all.  
21 MR. OHLEMEYER: I understand.  
22 MS. CHABER: Your Honor, that raises, and is  
certainly  
23 implied in what Mr. Ohlemeyer is indicating he intends to  
24 do, that raises another issue.  
25 Dr. Horowitz responded to a class action notice, not  
26 placed by my firm, Your Honor, not placed by any law firm,  
27 but a class action notice that was ordered by the Court in  
28 Texas that was overseeing the Ahearn, A-h-e-a-r-n, class  
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1 action, which is the largest class action of its kind of an  
2 asbestos case with Fibreboard and its insurers and the  
3 plaintiffs filing the class action together.

4 We are one of the four class counsel nationwide.

It's

5 our office, Steve case ens office over in Oakland, a Ron  
6 Motley's office out of South Carolina, and the fourth firm  
7 is somewhere else -- I'm spacing now -- the fourth firm is  
8 someplace on the East Coast.

9 There was a huge advertising campaign. In fact, the  
10 Court ordered that they spend, it was several million  
11 dollars advertising, because it is or was potentially a  
12 future class, and they deemed that notice was required to  
13 all potential members of the future class.

14 And as such, they put in the newspaper anyone who  
has

15 any of the following diseases, of which mesothelioma was  
16 right at the top. And also, you know, who worked in the  
17 following industries, and listed all sorts of different  
18 industries or different jobs, and Dr. Horowitz and his  
wife

19 saw this, and that is how they came to contact my law  
firm.

20 I don't think that there is anything probative about  
21 the issue that that is how they got to my law firm. It  
22 doesn't decide any issues in this case and yet, I expect  
23 that Mr. Ohlemeyer, particularly given what he just said,  
24 has every intention of trying to make that an issue in  
this

25 case as though that were somehow improper for someone to  
do

26 that, or as though my law firm advertised for people,  
which

27 we did not, have never done. We do not advertise for  
28 clients. We do not go seeking clients.

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1 But as a result of the Ahearn class action, we had to  
2 put on 15 people to answer telephones just to respond to  
3 information and send out claim forms to people, and so  
4 forth.

5 Dr. Horowitz happened to be one of those calls, and  
he

6 asked to speak to a lawyer after getting the information  
7 about the class action, because he was presently suffering  
8 from mesothelioma, and his doctors had told him it was  
9 asbestos-related.

10 I'm very concerned that this is going to be  
something  
11 that is going to be raised. It has prejudicial effect.  
It  
12 looks like I've been advertising for clients and that I  
went  
13 seeking them in Los Angeles, and I think it's an improper  
14 inference. And I don't think it advances the ball, in  
terms  
15 of any of the issues that need to be proved in this case,  
16 and I would ask the Court to caution defendants not to do  
17 that in their questioning and not to raise those issues.  
18 On the same token, I have a major concern because  
19 Dr. Horowitz's deposition was videotaped for preservation  
of  
20 testimony. We always videotape our mesothelioma and lung  
21 cancer clients because, unfortunately, we have lost many  
of  
22 them, and before their trial dates or they are so ill,  
that  
23 they are unable to come into court, and we use the  
videotape  
24 in lieu of their trial testimony. So he had a videotape  
25 deposition that was for preservation of trial testimony.  
26 During the course of that deposition, Your Honor, I  
27 had to object on attorney-client privilege more times than  
I  
28 think I've ever used that phrase in my life. The  
questions

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1 that were asked by Mr. Ohlemeyer were: And what  
discussions  
2 did you have with anyone, including your lawyers, about  
Kent  
3 cigarettes containing asbestos?  
4 And that type of questioning went on forever, with an  
5 implication that somehow the lawyers have manufactured this  
6 lawsuit. I think that there is no foundation for that, I  
7 think it's an improper inference, I think it's highly  
8 prejudicial for me to have to stand up here in court and  
9 object on attorney-client privilege grounds as though I'm  
10 trying to hide something, and I would ask the Court to  
11 caution defendants about that same issue, as well.  
12 I can cite the questioning, and it was not just  
13 Mr. Ohlemeyer at the deposition, it was Mr. Brake, as  
well,  
14 and he followed up on precisely the same questions and  
asked  
15 the same improper questions at the time of the deposition.  
16 And that's my concern, Your Honor. I think there's  
17 going to be an attempt through Dr. Horn and through my  
18 client to cast aspersions on myself and my law firm, and I  
19 think it's highly improper, and I would ask this court to  
20 not allow that to occur.  
21 MR. BRAKE: If I could be heard, because there's two  
22 sides to every story, and there's a problem with the way  
23 plaintiffs' counsel has characterized what she says we are  
24 going to do.  
25 There's an issue in the case that goes to the  
26 credibility of the plaintiff when he says he smoked Kent  
27 cigarettes. It has to do with how the case came about.

The  
28 case was filed in November of 1994. November of last  
year.

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1 After Dr. Horowitz saw this class notice in the newspaper,  
2 he called plaintiffs' counsel's firm. They then filed a  
3 lawsuit in November naming the garden variety universe of

--

4 what I understand to be the garden variety universe of  
5 asbestos manufacturers and suppliers.

6 In January, they sent the plaintiff up to meet with  
7 Dr. Horn.

8 MS. CHABER: December.

9 MR. BRAKE: December, I'm sorry. His report is dated  
10 January.

11 At that time, Dr. Horn interviews the plaintiff and  
he  
12 finds out, of course, that the only exposure he could  
really

13 come up with is this hospital in Cleveland and 13 days on  
a

14 troop ship, and maybe a house in Beverly Hills. In other  
15 words, he doesn't have an occupational exposure case.

16 And then, for the first time, as Dr. Horn testified,  
17 he brings up Kent cigarettes. Dr. Horn asks him what  
brands

18 he smoked. Dr. Horn said: I only asked him what brands.

19 He says: I smoked Kents in the '50s. Oh, boom, well then  
20 let's amend the lawsuit and bring us in, in addition, and

I  
21 think we were brought in in February or March. Later in  
the  
22 year.

23 Now, our only point is, and I think all we were  
24 getting at is we would like to know how come we were  
25 belatedly discovered as a supposed source of this man's  
26 exposure, and what the facts were surrounding that.

That's

27 what those questions went to in the deposition.

28 What did Dr. Horn tell you? Well, he told us about

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1 that, but the credibility of who was there and what were  
2 people told, we are getting at. I think that is very much  
3 in issue. I, for one, haven't frankly thought through what  
4 I would ask about that, if anything. And I certainly did  
5 not intend to come in and say: Isn't it true your lawyer  
6 told you to say Kent cigarettes, or anything of that sort.

7 That was a discovery deposition and what we wanted to  
8 know was: Who told you about Kent cigarettes and the  
9 asbestos, and how come basically you got a lawyer, you  
10 organized a case, you sued everyone in the world except  
us,

11 and then three months later you amend us in? It looked  
12 funny, and we wanted to know why it looked funny. And now  
13 counsel wants a blanket order. I, for one, am not going  
14 to --

15 THE COURT: I don't think she was asking for a  
blanket

16 order, per se, and I don't intend -- I don't do blanket

17 orders of that nature.  
18 All I can say with respect to that is sure, from  
what  
19 you've said, there's a basis to make an inquiry, but  
there's  
20 a way to do it. You don't do it in the fashion that she  
21 outlined, and whether you did that at deposition or not is  
22 beside the point. This isn't a deposition, this is before  
23 the jury, so you don't ask questions that are going to  
give  
24 rise to undue prejudice.  
25 There may be prejudice by the nature of certain  
26 things, of course. I mean, from what you said, people  
would  
27 wonder, naturally, and so he's entitled -- you're entitled  
28 to ask the question and he's entitled to explain. And if  
he

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1 gives a different answer or an unrealistic answer, you can  
2 probe, but you can't -- you're not supposed to do something  
3 that causes undue prejudice. That's all I can say.

4 MR. BRAKE: Exactly. In fairness to me, because  
5 counsel keeps suggesting that I've done this improper, I  
6 don't think I've asked a question yet that suggests an  
7 improper answer, and I wasn't going to ask: Didn't  
8 Ms. Chaber put ads in the paper for lawyers, for cases?

9 THE COURT: She's explained it all and you have added  
10 to the explanation, and assuming it was all of those  
things

11 to have a basis in fact, all I can say again is don't do  
12 something that's going to cause undue prejudice, because  
if  
13 you do, then one, I have to admonish the jury; secondly,  
it  
14 gives rise to some basis for a mistrial, perhaps. We  
don't

15 want to do that. We want to get the trial over with and  
get  
16 a decision and do something more interesting or equally  
17 interesting, or whatever.

18 MR. OHLEMEYER: Amen.

19 THE COURT: Depending on your point of view.

20 MR. BRAKE: Thank you, Your Honor.

21 MS. CHABER: Your Honor, I am really concerned about  
22 this because --

23 THE COURT: I understand, and I'm not going to give  
24 any more specific instructions. I've cautioned them.  
25 You've raised the issue, and they are on notice.

26 MS. CHABER: Let me read you the questions that were  
27 asked, Your Honor. This was a preservation of testimony.  
28 If I was putting my client on, these would be before you.

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1 And I'm asking for a preruling on them so that these  
2 defendants do not do that.

3 THE COURT: Well, I've told them, and if they do it,  
4 why, then that's the risk.

5 MS. CHABER: First of all, complaints are filed  
6 unverified. My client did not verify --

7 THE COURT: Okay. I think that it's appropriate, if



8 it was added sometime later, to find out why it occurred.  
9 MS. CHABER: That's fine. I don't have a problem  
with  
10 the timing. Dr. Horn told him it contained asbestos. We  
11 got Dr. Horn's -- the information from Dr. Horn and we  
filed  
12 an amended complaint.  
13 THE COURT: Fine.  
14 MS. CHABER: But to ask my client the reasons he  
15 understands the lawyers didn't do it initially and did it  
16 later --  
17 THE COURT: That's not the question he's to ask.  
The  
18 questions that he's to ask is to find out when he found  
out  
19 about Kents cigarettes, when he told somebody, or whatever  
20 it is. They can ask him that. When did you determine  
that  
21 Kent cigarettes were a contributing factor to your  
illness?  
22 MS. CHABER: And he's going to say: When I met with  
23 Dr. Horn.  
24 THE COURT: That's fine. And that may end it. I  
25 don't know. And they know more than I know about it, as  
you  
26 do. And I can't imagine what the questions will be, and  
I'm  
27 not going to speculate about them, but I have cautioned  
28 them.

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1 MR. BRAKE: Your Honor, the more Ms. Chaber gets up  
2 and essentially accuses me of various malfeasance, the more  
3 annoying it gets. Let me just cut through it. She's  
afraid  
4 I'm going to say to her client: Isn't it true that your  
5 lawyer told you that you needed to bring Kent in and say  
you  
6 smoked those cigarettes?  
7 I am not going to ask that question. I don't -- it's  
8 as simple as that. I don't know what other improper  
9 questions she thinks I'm going to ask, but I'm not going to  
10 ask that.  
11 MS. CHABER: These are the improper questions, Your  
12 Honor. Did you, prior to the lawsuit being filed -- I  
take  
13 it you met with your lawyers and relayed to them  
information  
14 about what you felt were the circumstances under which you  
15 were exposed to asbestos.  
16 Did you specifically, very specifically, did you  
tell  
17 your lawyers, prior to the filing of the original  
Complaint  
18 on November '94 that you smoked Kent cigarettes? That's  
19 totally improper. That's attorney-client privilege, and  
20 that's what they were seeking to go into at that point and  
21 that's what they intend to do.  
22 MR. BRAKE: She had already introduced a waiver  
issue  
23 into that deposition. And what I wanted to know was when  
24 the man knew about Kents. It's a perfectly fair question,

25 because if he had reason to know before -- this isn't a  
big  
26 secret. Kent cigarettes have asbestos in them. He filed  
a  
27 lawsuit in November, he didn't join us until January.  
28 MS. CHABER: He saw Dr. Horn on December 9th. We  
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1 joined you in December.  
2 MR. BRAKE: I inquired in deposition, and there was a  
3 very real waiver issue.  
4 MS. CHABER: There was no waiver of my  
attorney-client  
5 privilege.  
6 MR. BRAKE: The point is, I have already said we are  
7 not going to ask him did your lawyer --  
8 MS. CHABER: I can't waive it, anyway. My client  
9 hasn't waived it.  
10 MR. BRAKE: You're you're clients' --  
11 THE COURT: Don't all talk at once. Nobody gets  
12 anything.  
13 MS. CHABER: Only a client can waive attorney-client  
14 privilege.  
15 THE COURT: That's correct. All I can say is don't  
16 ask improper questions.  
17 MR. BRAKE: I have no intention -- I have not asked  
18 one yet in the trial, and I have no intention of asking an  
19 improper question.  
20 THE COURT: All right.  
21 MR. BRAKE: Thank you, Your Honor.  
22 MS. CHABER: I wanted the Court to be apprised of  
23 that.  
24 MR. BRAKE: The simple purpose being to try to  
affect  
25 my credibility, which is totally unfair. There's a  
26 perfectly legitimate line of inquiry at the time.  
27 MS. CHABER: The simple purpose is so I don't have  
to  
28 stand up here and object on attorney-client privilege,  
which

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1 looks like we are trying to hide something.  
2 THE COURT: I understand.  
3 MS. CHABER: That's an improper inference.  
4 Comproni, I guess, would be the deposition.  
5 THE COURT: All right.  
6 MS. CHABER: I have just received the defendants', so  
7 I haven't had a chance to look at theirs or compare it, but  
8 we can do it as we go along.  
9 MR. BRAKE: I don't mind waiting, either, because I  
10 did it on 24 hours notice. If you'd like to do them  
11 tomorrow, that's fine with me.  
12 MS. CHABER: No, I'd like to do them now.  
13 MR. BRAKE: My first objection, Your Honor, is in  
14 Mr. Comproni's volume 1, April 16, if Your Honor has that.  
15 THE COURT: What page?  
16 MR. BRAKE: The first one is on page 4 at the  
outset.  
17 My objection actually is to lines 7 to 12.  
18 THE COURT: Wait until I find it. I've got two

volume

19 two's here.

20 MS. CHABER: I'm sorry.

21 THE COURT: What, starting at line what, Mr. Brake?

22 MR. BRAKE: Line 7 to 12, Your Honor, which is the  
23 introductory colloquy from the lawyer, which is not  
24 evidence, not relevant.

25 THE COURT: Well, that, I assume --

26 MR. BRAKE: The problem is he goes on -- I think we  
27 can dispense with that.

28 THE COURT: Page 4 from lines 4 through 15 or  
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1 something, which is all about somebody else's law firm, you  
2 don't want that in, do you?

3 MS. CHABER: No.

4 MR. BRAKE: So we will begin on line 13, which is the  
5 first question?

6 MS. CHABER: Yes.

7 MR. BRAKE: Thank you. Then I don't have any  
8 objections until we get up to page 8, Your Honor, beginning  
9 at line 14, goes through to page 9, line 3.

10 My objection here, Your Honor, is he's been given --  
11 it's a relevance objection. He's given certain reports  
and

12 asked to read from those reports the dates he visited the  
13 factory. He's reading off the report, and I have a  
14 relevancy problem with it. I understand it's sort of  
15 foundational to a lot of the testimony, but I'm not sure  
16 it's really necessary.

17 MS. CHABER: I think he's entitled to refresh his  
18 recollection as to the dates of something that he did 40  
19 years ago, Your Honor, and I think that's really all that  
20 that was an effort to do.

21 MR. BRAKE: See, this is what I'm saying. You can  
22 refresh a witness' recollection after he testifies to a  
23 lapse of memory. This man didn't have any actual memory,  
24 and so he was given documents. When did you go there?

Oh,

25 I went April the 15th, blah, blah, blah. So there's no  
26 testimony here as to a lapse of memory. It's simply him  
27 reciting off the document. That's really the nature of my  
28 objection to this.

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1 MS. CHABER: The point is merely to get the dates.

If

2 you don't want the reports mentioned--

3 MR. BRAKE: I don't know it's so much that. There's  
4 later testimony about his five visits. This is really not  
5 that relevant. He reads off the reports the five days. He  
6 reads -- and I don't have an objection to he went there a  
7 series of times. You can't really use that transcript  
8 without that testimony. I don't think it's really fair to  
9 do this. I'll drop it.

10 MS. CHABER: How about if we do it this way.

11 MR. BRAKE: That's okay.

12 MS. CHABER: The answer on page -- on lines 12  
through

13 13, I made several visits to their plant in West Groton,  
14 Massachusetts, skip down to line 21, well, the first visit

15 was on October 27th, 1952. Then there's no inference that  
16 he's reading off of reports, he's just giving the dates.  
17 MR. BRAKE: Is that would be fine.  
18 THE COURT: All right.  
19 MR. BRAKE: The man went there. I don't have a  
20 problem with that.  
21 I have listed an objection on page 13. Well, I  
don't  
22 think Ms. Chaber really needs it. This is sort of  
sticking  
23 out by itself. Again, all it shows is he's reading off  
the  
24 report. In the interest of moving it along, I'll drop  
that  
25 one. It's no big deal.  
26 On page 14, Your Honor, line 5 to 11, designation  
goes  
27 on -- I don't have a problem with lines 12 to 18, but line  
5  
28 to 11 is classic hearsay. The witness has no memory of  
who

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1 he talked to. He's simply reading it off the report, and I  
2 object to lines 5 through 11.  
3 MS. CHABER: If he has no memory, he's refreshed his  
4 memory with the report.  
5 MR. BRAKE: You had him just read the report, which  
is  
6 inadmissible. He didn't testify to a lapse of memory, he  
7 just reads it off the report.  
8 THE COURT: Okay. Sustained.  
9 MR. BRAKE: So we will read beginning at line 12.  
10 The next objection is beginning on page 16, line 21,  
11 carries over to 17, line 5, and I have a relevance  
12 objection. He's talking about what he was told about the  
13 percentage of asbestos in the processes, and he's speaking  
14 of the manufacturing plant that this man visited.  
15 My objection is that it's really a relevance one.  
The  
16 30 percent number is not a big deal to me, but it's  
mislead  
17 in the context of this case about this product, because  
18 Dr. Longo will testify -- there's other evidence,  
including  
19 the patents which counsel will probably offer in evidence,  
20 and Dr. Longo's testimony -- this, I think, is not  
relevant,  
21 and it's essentially confusing.  
22 The 30 percent number relates to the industrial  
23 process, I think not the actual filter. The filter, I  
24 think, even Dr. Longo will agree, is not 30 percent  
25 asbestos, and that's misleading, and I would suggest not  
26 relevant.  
27 MS. CHABER: Your Honor, that was the information  
that  
28 he was provided at the plant, and that was the basis of  
his

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1 opinions on dust levels and hazards. And the source of

that

2 information is the plant manager. So if it's incorrect  
3 information, it's information supplied by Hollingsworth and  
4 Vose.

5 MR. BRAKE: It's correct as to the dust process --  
6 it's correct as to what, one assumes 30, 40 years later,  
7 because he reads this off a report, he records that he's  
8 told the process is 30 percent asbestos, but what's in the  
9 process seems to be, all I'm saying, is different than  
10 what's incontrovertible as to what was in the cigarette.

11 In other words, asbestos -- it's not 30 percent in  
the  
12 end product. To be honest, it's not a huge deal to me.

The

13 only thing, if counsel really wants it, I'll drop the  
14 objection, but here's my concern. I don't want it to be a  
15 Trojan horse to get us into the industrial plant and what  
16 was going on at the plant.

17 She's designated a little bit, this whole -- she's  
18 designated just a little bit about that, so I'd like it  
19 understood I have a very strong relevance objection to it.  
20 The 30 percent number by itself is really irrelevant.

21 THE COURT: I'll let it in, then.

22 MR. BRAKE: This brings me up, I believe, to --  
23 carries me up to page 24, line 5 to line 23. And I'll

note,

24 Your Honor, the designation that counsel has begins on 23.  
25 And in that, she's going to read part where this man  
26 purports to tell Hollingsworth and Vose about the hazards  
of  
27 asbestos.

28 And I had a motion in limine on this, and my memory  
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1 was, Your Honor, your ruling was she could testify, have  
him

2 testify, read the parts that related to him telling  
3 Hollingsworth and Vose about knowledge of asbestos, but  
that

4 we wouldn't get into the plant, so I want the record to be  
5 clear I made that objection in the motion in limine.

6 I'm not going to renew that today, but where I do  
have

7 a problem, as I said, it's 24, line 5, with a series of  
8 questions beginning: Did this seem to be any surprise to  
9 them, and the particular objection to this is, if you look  
10 at the question on line 15: What leads you to say that,  
11 sir, why you felt they weren't surprised?

12 Because he goes on to say that they had been dealing  
13 with asbestos and they were told by our inspector  
certainly

14 before we arrived, and they seem, therefore, to be  
cognizant

15 of the fact there's asbestos material. He's talking about  
16 something of which he cannot have personal knowledge.

He's

17 speaking about what someone else, this inspector named  
Hahn

18 that was with him told him.

19 It's very nature, from line 5 on page 24, to the end  
20 of that page, is testimony, as he's testified to, he has

no

21 foundation to give that statement as to what they knew  
when  
22 he showed up.  
23 MS. CHABER: Well, he certainly can testify to what  
24 they were cognizant when he showed up. He says they were  
25 cognizant of the fact they had a hazardous material. They  
26 have conversations with them.  
27 MR. BRAKE: It's based on the fact he was told by  
the  
28 inspector, certainly before we arrived.  
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1 MS. CHABER: And, it says: And upon our arrival,  
they  
2 were cognizant of the fact that they had hazardous  
material.  
3 If you want the conversation by the inspector before out,  
4 that's fine. But the "and upon our arrival," he was there.  
5 They were cognizant of the fact they had a hazardous  
6 material.  
7 MR. BRAKE: On page 25 and 26 he gives his real  
8 testimony on the subject, which he says that he discussed  
9 with them the hazards with regard to his sampling. I  
10 haven't objected to that. He explained, on page 26, line  
13  
11 to 17: What's your best recollection of the gist of those  
12 discussions? The answer, on line 50: To merely explain  
to  
13 them that we were here to evaluate their potentially  
14 hazardous work conditions. Our test results will  
determine  
15 whether further controls were necessary in the plant.  
16 MS. CHABER: I think if you turn over to page 26,  
Your  
17 Honor, you'll see --  
18 MR. BRAKE: That's where I'm reading.  
19 MS. CHABER: -- you'll see, on the bottom of page  
25,  
20 he says, I think over onto 26: What I was about to ask  
you  
21 when I was interrupted is what leads you to believe that  
22 they were cognizant of the hazards of asbestos when you  
23 visited them in the 1950s? Answer: We discussed that at  
24 the time we were doing our sampling.  
25 MR. BRAKE: Absolutely, and I don't object to this,  
26 and I don't object to we discussed it with them, the plant  
27 manager. And what's your best recollection? And he says  
28 what his recollection is. And he's very clear as to what  
he

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1 says he discussed with them, potentially hazardous working  
2 condition of the test result. Fair enough. That's what he  
3 told them.  
4 But the earlier page where he goes on, did they seem  
5 to be spliced, they were knowledgeable, how did you know  
6 they were knowledgeable, what leads you to say that,  
7 circumstance, they had been dealing with asbestos  
8 previously, so it's drawing an inference there.  
9 And they were told by inspectors, certainly before we  
10 arrived. He's speculating about something that happened

11 before he could have personal knowledge of it. The only  
12 portion of this whole discussion --  
13 THE COURT: This is 24, line 5?  
14 MR. BRAKE: Through line 23, which I think are the  
15 questions tainted by his lack of personal knowledge.  
16 THE COURT: All right. Page 24, line 5 through 23  
17 will go out.  
18 MR. BRAKE: And I don't object then, Your Honor,  
until  
19 page 51. Designation begins on line 17, continue over  
until  
20 53, line 1, is the portion I object to.  
21 MS. CHABER: Your Honor, could we just go back a  
22 second, because I want to just see something. I just  
wanted  
23 to see -- Your Honor, I would ask to be able to leave in  
24 from lines 5 through 9 on page 24. And then it follows  
over  
25 to the next question that's asked on page 25, beginning at  
26 line 24.  
27 Did this seem to be any surprise to them? No, I  
don't  
28 believe they were surprised at all. They were  
knowledgeable

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1 about the effects of asbestos. What I was about to ask --  
2 and we will leave out when I was interrupted part is: What  
3 leads you to believe that they were cognizant of the  
hazards  
4 of asbestos when you visited them in the 1950s?  
5 Answer: We discussed that at the time we were doing  
6 the sampling. That leaves out any of what counsel has  
7 raised as the improper basis for it, but yet, makes sense  
to  
8 the next question because otherwise, you have a question  
out  
9 there without the predicate.  
10 MR. BRAKE: See, lines 5 through 9 on page 24 are  
11 tainted by the next question. The objectionable one is  
the  
12 following. Question, line 5 through 9: Did this seem to  
be  
13 a surprise? No, I don't think so. What leads you to say  
14 that, sir? Well, our inspector certainly had told them  
15 before we arrived.  
16 I think 5 through 9 is tainted by the subsequent  
one,  
17 and I would simply point out that to go to page 26 where  
the  
18 correct answer is, you could simply begin on line 2 with  
the  
19 actual question. What leads you to believe that they were  
20 cognizant of the hazards of asbestos when you visited them  
21 in the 1950s? And the answer is based on when he was  
there  
22 and did his sampling, he told them about the potentially  
23 hazardous working condition.  
24 MS. CHABER: But the point is that that set of  
25 questions was to cure what defendants objected to at the  
26 time at the deposition.  
27 MR. BRAKE: Then read the curative portion.

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1 curative portion, and then I'm skipping over to the  
curative

2 portion and rephrased the question in a manner that was not  
3 improper.

4 MR. BRAKE: I think the curative portion is page 26,  
5 which is all the testimony really has the ability, and he  
6 gives it on page 26.

7 THE COURT: I think that the section that I  
designated

8 before should be omitted on page 24.

9 MR. BRAKE: We were at page 51, and my objection is  
10 from page 51, line 17, till 53, line 1. And I have two  
11 objections. This is where he asked: Well, when you went  
to  
12 the plant, did you know what they were manufacturing?

Yeah,

13 filter media for cigarettes. And basically the question  
is

14 put: How did you react to the fact, which is actually an  
15 opinion question. What's your opinion of that is really  
16 what the question is. And he goes on to say he was  
17 appalled, but he didn't have power to do anything about  
it.

18 And my fundamental objection is to this I was  
19 appalled, and then: Can you tell us why you were  
appalled?

20 He's giving essentially an opinion, coming as an expert  
21 witness and saying, this is really, in my opinion as a  
22 second year industrial hygiene inspector, this was really  
a  
23 terrible thing, and I don't think they have the foundation  
24 nor -- in fact, he demonstrably does not have the  
expertise

25 to give that kind of opinion. That actually has been  
26 excluded on the basis of opinion before.

27 MS. CHABER: It's also been admitted in another  
trial.

28 MR. BRAKE: It's been excluded in California.

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1 MS. CHABER: It was admitted in Philadelphia.

2 MR. BRAKE: It's also, I would suggest, Your Honor,  
3 unduly prejudicial. This notion that some inspector one  
4 year out of Plymouth State College was supposedly appalled  
5 by this has, I think, little probative value. He talks  
6 about the hazards of asbestos later in deposition in both  
of  
7 our designations, what was known with precision, and this  
is  
8 just prejudicial.

9 MS. CHABER: Your Honor, they have raised that  
people,

10 during that time period, that putting the asbestos in the  
11 filter was a good idea and everybody agreed with them that  
12 it was a good idea.

13 And this is a person who was working out there in  
the  
14 field at the time at that plant who knew what they were



15 doing who did not think it was a good idea to put asbestos  
16 in the filter of something that was going into a cigarette  
17 that was designed to be inhaled into people's lungs.

18 This goes precisely to the point of the issue of  
state

19 of the art and of state of mind during that time frame.  
20 They'd like to say that the AMA sanctioned asbestos in the  
21 filter because, when they wrote an article about filter  
22 cigarettes and whether they effectively filtered out tar  
and

23 nicotine, they mentioned the word asbestos, and therefore,  
24 by that, they were sanctioning its use in a filter of the  
25 cigarette, which they clearly did not in later editorials  
26 that they've written.

27 But the point is this is somebody at the time who  
was

28 in a position to know, who had opinions about asbestos --

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1 that was his job, to have opinions about it -- who was  
2 expressing that it was not a good idea to put asbestos in  
3 the filter, and this goes directly to the heart of the  
issue

4 on that.

5 MR. BRAKE: The only thing I want to point out, Your  
6 Honor, I don't want to reargue what I did, but on page 53,  
7 counsel had -- her designation runs from page -- line 1 is  
8 where my objection ends, and from 3 to 20, he goes on to  
9 say -- and if I could think of a way to exclude it, I'd  
like

10 to. But given Your Honor's prior ruling about this man  
and

11 knowledge, so be it.

12 From 3 on he testifies to what Ms. Chaber is saying.  
13 He says that he was curious as to why they would do that,  
14 and he asked H and V why they would do it, and they said  
15 they thought it was -- apparently felt, he actually says,  
16 apparently felt it was a satisfactory use of asbestos.

What

17 I'm objecting to is his opinion and the prejudicial nature  
18 of it.

19 THE COURT: I think he gives an answer, Mr. Brake.  
20 He's indicated on page 53 he says it's a toxic material.

21 MS. CHABER: I understand that, Your Honor, but with  
22 respect to the issue of whether it was a good idea, which  
23 they raised -- they raised the issue in opening statement  
24 that it was a good idea to put the filter and everybody  
25 agreed with them. This is one person in a position to

know

26 who did not agree with them. And they spent --

27 THE COURT: Where does it say -- are there questions  
28 and answers with respect to who this person is?

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1 MS. CHABER: Oh, yes, absolutely.

2 THE COURT: Where is that? I haven't read it.

3 MS. CHABER: All through the beginning.

4 MR. BRAKE: There's really not much --

5 MS. CHABER: He was born in 1927. His first position  
6 was with occupational health. He went to the Department of  
7 Occupational Health, took six months in training in air

8 sampling and in ventilation control.  
9 MR. BRAKE: Actually, Your Honor, the clearest part,  
10 if counsel will allow me, there's a little bit about his  
11 current jobs and his jobs in Massachusetts state  
industrial  
12 regulatory agencies.  
13 But from page 59 to 70, which counsel has  
designated,  
14 I asked him a series of questions about who he was and  
what  
15 was his background before 1952. There's 11 pages about  
it.  
16 He essentially had graduated from teachers college,  
Plymouth  
17 State, with a math degree in October of '51, had joined  
the  
18 division of occupational hygiene, and had been there for a  
19 year.  
20 THE COURT: Does it tell what his training  
background  
21 and experience is?  
22 MS. CHABER: Yes. He studied filtration at Plymouth  
23 State, he had chemistry, qualitative and quantitative  
24 analysis, did a lot of filtration.  
25 MR. BRAKE: Where does it say that?  
26 MS. CHABER: On page 61. He got his degree in '49,  
27 then went into the Navy.  
28 MR. BRAKE: We are not going to finish this one  
before

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1 10:00, and I think we would all agree it would be better to  
2 start with Dr. Horn. Perhaps Your Honor could take it  
under  
3 advisement and read his qualifications.  
4 THE COURT: All right. I'll do that.  
5 MR. BRAKE: Thank you, Your Honor.  
6 MS. CHABER: I would ask you to look at sections  
7 beginning on page 59, but also going through 60 --  
8 THE COURT: 60 what?  
9 MS. CHABER: 70.  
10 MR. BRAKE: I designated 70 and 71, but yeah.  
11 THE COURT: All right. I'll read it.  
12 MR. BRAKE: Another objection I had, on 54,  
beginning  
13 at line 16, running over until 55, line 21, he's shown one  
14 of the ever present advertisements, and he's asked -- he's  
15 read part of the advertisement. Then he's asked a series  
of  
16 opinion questions.  
17 Would he consider it accurate to characterize an  
18 asbestos cotton mixture as dust-free? No. Could it be  
19 completely harmless? No. Could it be safe? Well,  
dynamite  
20 is safe if it doesn't go off, but the potential is  
certainly  
21 there for an unsafe situation.  
22 My objection, Your Honor, is that's clearly an  
attempt  
23 to create prejudicial testimony. The ad says what it  
says.  
24 There can be independent testimony about this mixture as

it  
25 ended up in the filter, whether it's safe or not. This  
man  
26 really should not be giving an opinion on that. It's not  
27 relevant. Its probative value, which is essentially nil,  
is  
28 outweighed -- it's an attempt by the person that took this  
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1 deposition to create a nice piece of prejudicial evidence,  
2 and I would respectfully ask that be excluded.

3 MS. CHABER: Your Honor, if he was here in court --  
we

4 go through this all the time with depositions. If he is  
5 here in court, those ads are in evidence -- we would be  
6 entitled to ask this man, back then, not present day, back  
7 then, when you were going to the H and V plant, would you  
8 consider it to be accurate to characterize an asbestos  
9 cotton mixture as dust-free. Those are perfectly  
10 permissible questions.

11 That's their characterization of the cigarette  
filter

12 being safe, dust-free and completely harmless, and he  
13 certainly could be questioned about, back then, whether he  
14 would consider that an accurate representation.

15 MR. BRAKE: The thing is what it really is, is a  
16 toxicological opinion with an incomplete hypothetical.  
17 Could a cotton asbestos mixture be safe, completely  
18 harmless, dust-free. It all depends on a wide variety of  
19 circumstances.

20 All they are really doing is showing him the  
21 advertisement that they like to take issue with and  
saying:

22 It sounds kind of crazy to you, doesn't it? Well, yeah,  
23 dynamite could be safe if it doesn't go off, but this  
24 doesn't seem safe. It's not real evidence of anything.  
25 It's an attempt to create a nice prejudicial expression  
for  
26 the jury.

27 I'll submit it, Your Honor.

28 THE COURT: Okay. I'll let it in.

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1 MR. BRAKE: That's all my objections to volume 1,  
Your  
2 Honor.

3 MS. CHABER: And I agree with Mr. Brake --

4 THE COURT: We will take our recess then until 10:00  
5 and all the jurors get here. And we will finish with  
6 Dr. Horn without recess, unless it goes beyond 12:15.

7 MS. CHABER: Okay.

8 THE COURT: And if you see the jurors nodding, go  
over  
9 and pinch them.

10 (Recess taken.)

11 (In open court in the presence of the jury.)

12 THE COURT: Good morning ladies and gentlemen.

13 JURORS: Good morning.

14 THE COURT: Once again, we are altogether, everybody  
15 is here, so he's under oath, and have you finished with  
his

16 examination?  
17 MS. CHABER: No, I have not.  
18 THE COURT: All right. You may proceed then.  
19 BARRY L. HORN, M.D.,  
20 having been previously duly sworn, resumed the stand and  
21 testified further upon his oath as follows:  
22 CONTINUED DIRECT EXAMINATION BY MS. CHABER  
23 MS. CHABER: Q. Dr. Horn, yesterday we looked at  
24 chest x-rays and CT scans in relation to Dr. Horowitz and  
25 the mesothelioma. I'd like you to look at this two-page  
--  
26 well, actually let me show counsel and have it marked.  
27 Sorry.  
28 MS. CHABER: I'd like to have marked as next in  
order

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1 a January 17, 1995 CT scan report.  
2 THE CLERK: Plaintiffs' 28 marked for identification.  
3 (Plaintiffs' 28 marked for identification.).  
4 MS. CHABER: Q. Dr. Horn, are you familiar with  
5 Plaintiffs' 28?  
6 A. Yes.  
7 Q. And what is that?  
8 A. This is a copy of the report of the CT scan done on  
9 January 17th, 1995 at Tower Imaging in Los Angeles.  
10 Q. And is that a report of a CT scan that you showed  
the  
11 jury yesterday?  
12 A. Yes.  
13 Q. Is there any indication on that CT scan report that  
14 Dr. Horowitz has an asbestos-related condition other than  
15 mesothelioma?  
16 A. Yes.  
17 Q. And what is that?  
18 A. I'll quote from the report. "There is faint,  
somewhat  
19 lacy calcification seen at the right lung base, which is  
20 probably pleural."  
21 Q. And what is that describing?  
22 A. Pleural plaque, calcified plaque, involving the  
23 diaphragm.  
24 Q. And that is what you pointed out yesterday?  
25 A. Right.  
26 Q. And do other things cause calcified plaques?  
27 A. Not there.  
28 Q. When you say "not there," what do you mean by that?  
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1 A. Really, the only thing that causes calcification in  
2 that way in that location is prior asbestos exposure.  
3 Q. And when you see that in an individual, if you did  
not  
4 have a history of exposure to asbestos, what would you  
think  
5 caused that?  
6 A. I would say I may not have the history, but that  
7 person was exposed to asbestos.  
8 Q. Dr. Horn --  
9 MS. CHABER: I'd move that into evidence, Your Honor.  
10 MR. OHLEMEYER: No objection.

11 THE COURT: It may be admitted.  
12 (Plaintiffs' 29 received in evidence.).  
13 MS. CHABER: I'd like to have marked as plaintiffs'  
14 next in order, a summary of medical charges.  
15 THE CLERK: Plaintiffs' 29 marked for  
identification.  
16 (Plaintiffs' 29 marked for identification.).  
17 MS. CHABER: Q. Dr. Horn, have you had an  
opportunity  
18 to review the summary of medical charges relating to  
19 Dr. Horowitz?  
20 A. Yes.  
21 Q. And those are charges from when to when?  
22 A. From June 22nd, 1994 through July 14th, 1995.  
23 Q. Did you review his medical records in the past?  
24 A. Yes.  
25 Q. And is everything, all of the treatment and care  
that  
26 he has had with respect to the mesothelioma, reflected on  
27 that summary of charges?  
28 A. No.

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1 Q. What's missing from that?  
2 A. None of the charges from Cedar Sinai are included in  
3 this list. This includes everything but Cedar Sinai.  
4 Q. What is the total of the medical charges that are  
5 included in Plaintiffs' 29?  
6 A. \$52,816.  
7 Q. And what did he have done at Cedar Sinai that is not  
8 included in there?  
9 A. Well, he had an operative procedure done in mid-July.  
10 He had a procedure called throacoscopy which I described  
to  
11 the jury. That's done in the operating room. He was in  
the  
12 hospital overnight and obviously, the hospital bill for  
13 these services. He was in the operating room. There were  
14 all the nurses and all the equipment and everything, so  
none  
15 of that is included. He also had a couple of trips to the  
16 emergency room in January, and those bills aren't  
included,  
17 either.  
18 Q. And what would be the cost of the hospital charges  
for  
19 the thoracoscopy?  
20 A. That would depend on the time. Somewhere between 5-  
21 and \$10,000.  
22 Q. And emergency room visits?  
23 A. Couple of hundred dollars each.  
24 Q. So that in addition to the 52,000 on the medical  
25 summary, how much more would you add for what's not  
26 reflected there?  
27 A. Somewhere between 5- and \$10,000.  
28 Q. Is Dr. Horowitz likely to require care in the  
future?

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1 A. Oh, there's no question he'll require care in the  
2 future.

3 Q. And what kinds of things will he require, is it  
likely

4 that he will require care for?

5 A. Well, let's, for the moment, assume that he doesn't  
6 get anymore aggressive care from this point on. That is,  
he  
7 doesn't receive radiation or chemotherapy.

8 As this disease advances -- he's been very fortunate  
9 that he's responded to treatment, but this disease will  
10 advance and the malignancy will kill him.

11 As the disease advances, he will have increasing  
12 problems. He'll be seeing his physician regularly. He  
will

13 have increasing shortness of breath over time. He will  
14 require oxygen at some point in time. He will have  
15 increasing pain over time, because the malignancy will  
16 invade the chest wall. So he'll have the costs involved  
17 with getting pain medication and, depending upon the  
extent

18 of the pain, it can get fairly sophisticated in terms of  
19 pain regimen.

20 He is likely to be hospitalized at least one more  
time

21 before he dies because of some complication that occurs.

22 Commonly, individuals develop recurrence of pleural fluid

--

23 that's fluid around the lining of the lung -- making them  
24 increasingly short of breath, and they need to be admitted  
25 to drain the fluid, or they are admitted because pain gets  
26 out of control, and they need to be readmitted to get on

an

27 appropriate pain regimen, and sort of gain control of  
28 situations that are out of control. So it's likely,

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1 assuming he has only conservative care, he will be admitted  
2 again.

3 Later, in the stage of this disease process, he, in  
4 addition to being very short of breath and having a lot of  
5 pain and being on a lot of pain medication, he will lose  
6 weight, he'll become progressively weaker, and as the  
7 disease advances, he'll be able to do less and less for  
8 himself, and he'll need more and more help, including help  
9 with his daily activities that, I presume, now he's able to  
10 do on his own.

11 He will eventually require 24-hour-a-day,  
12 seven-day-a-week care. And if you pay somebody to do that  
13 in the metropolitan area, such as this and Los Angeles,  
that

14 costs about \$150 per eight-hour shift.

15 So assuming he doesn't have any further aggressive  
16 care, but is treated symptomatically and to keep him  
17 comfortable, his care from this point on will cost  
somewhere

18 in the order of about \$50,000.

19 Now, if he's treated aggressively from this point,  
20 because the disease recurs, and it wouldn't surprise me if  
21 his physicians were to elect to do so, because he's  
already

22 responded, clearly, to treatment, then the costs increase  
23 substantially.

24 Q. Let me just stop you there a second.

25           If Dr. Horowitz was your patient, given the response  
26   that he's had to chemotherapy, would you recommend  
27   additional chemotherapy?  
28   A.     When the disease recurs? Yes, I would.  
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1       So if you start giving him chemotherapy again, then  
2   the costs multiply. So if he gets additional chemotherapy  
3   similar to what he had before, you're talking about another  
4   30 to \$50,000 on his costs.

5       And his oncologist, the doctor treating his cancer,  
6   was not fooling with him, treated him very aggressively  
with  
7   chemotherapeutic agents. And if you're going to treat this  
8   malignancy, you treat it. You don't fool with it. The  
risk  
9   of having significant side effects from treatment is pretty  
10   high. So his risk of having a complication from the  
11   chemotherapy is really quite high.

12       The typical complication that occurs is the  
13   chemotherapy wipes out the white blood cells and your  
14   ability to fight infection disappears, and then you  
15   become -- you develop overwhelming infection and need  
16   admission for this. This is very common in people who are  
17   aggressively managed with chemotherapy. And the cost for  
18   that kind of hospitalization might be anywhere from 10,000  
19   to \$50,000, depending upon how sick he got and how  
20   aggressively he was managed during the hospitalization.

21       So potentially, if he's just treated conservatively  
22   from this point on, the costs for care will be in the  
order  
23   of \$50,000. If he's treated more aggressively, which he  
and  
24   Dr. Horowitz and his physicians would need to decide what  
to  
25   do -- that isn't my decision, although if I were treating  
26   him, I probably would recommend it -- you're now adding  
27   probably another 50 to \$100,000 to his future costs of  
care.

28   Q.     Yesterday you said that mesothelioma patients tend  
to

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1   end up on oxygen?

2   A.     Yes, he will wind up on oxygen.

3   Q.     And why is that?

4   A.     Because the malignancy makes that lung ineffective.  
5   The malignancy, as it grows and becomes more space  
6   occupying, the underlying lung has to get smaller and  
7   smaller, and it also invades the lung.

8       And as that lung gets smaller and smaller, it becomes  
9   less and less efficient. That is, the purpose of the lung  
10   is to get the air to mix with the blood. If air is not  
11   going into the lung or the lung is invaded by cancer  
tissue,

12   then you don't properly mix air with blood, and the blood  
13   that comes out of the lung doesn't get adequately  
14   oxygenated, so you wind up short of breath. The symptom  
you  
15   get from that, if you don't get adequate amount of oxygen  
16   in the blood, is you are short of breath.

17 Q. Is Dr. Horowitz likely to die from mesothelioma?  
18 A. This malignancy will kill him.  
19 Q. And in your opinion, will it kill him before his  
20 normal life expectancy?  
21 A. Yes.  
22 Q. Dr. Horn, let me switch topics for a second.  
23 Are you familiar with any medical articles or  
comments  
24 in medical articles regarding whether the AMA sanctioned  
25 advertising of Kent cigarettes in medical journals?  
26 MR. OHLEMEYER: Your Honor, advertising of  
cigarettes  
27 or any other products is beyond this witness' stated and  
28 described areas of expertise, and I object on the basis of  
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1 relevance.  
2 THE COURT: I think you better lay a foundation for  
3 it.  
4 MS. CHABER: Q. Dr. Horn, the Journal of the  
American  
5 Medical Association, is that a familiar journal to you?  
6 A. Yes.  
7 Q. And is that something that you read?  
8 A. Yes.  
9 Q. And have you read, in the past, articles and  
10 editorials in the Journal of the American Medical  
11 Association?  
12 A. Yes.  
13 Q. And have you done so in the course of becoming  
14 knowledgeable about the work that you do as a pulmonary  
15 doctor?  
16 A. Yes.  
17 Q. And is one of the issues that you look at, as a  
18 pulmonary doctor, cigarette smoking?  
19 A. Yes.  
20 Q. Are you familiar with any articles by the Journal of  
21 the American Medical Association commenting upon cigarette  
22 advertising?  
23 MR. OHLEMEYER: Same objection, Your Honor. We are  
24 still talking about cigarette advertising, not pulmonary  
25 medicine.  
26 THE COURT: Sustained.  
27 MS. CHABER: Q. Dr. Horn, have you seen any  
articles  
28 by the Journal of the American Medical Association  
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1 commenting upon the use of the Journal of the American  
2 Medical Association to sanction the smoking of filter  
3 cigarettes?  
4 MR. OHLEMEYER: Same objection, Your Honor.  
5 THE COURT: Sustained.  
6 MR. BRAKE: Could I have an instruction when counsel  
7 asks a question that seems to contain a fact and you've  
8 sustained the objection, that the jury is to disregard the  
9 question?  
10 THE COURT: Yes. Well, the question is not evidence  
11 unless it relates to an answer that is given, so you're to  
12 disregard a question if an objection is sustained to the  
13 question.



14 MS. CHABER: Q. Dr. Horn, in the course of your  
work  
15 and study as a pulmonologist, have you taken it upon  
16 yourself to become knowledgeable about the state of  
17 knowledge with respect to cigarette smoking?  
18 A. To --  
19 MR. OHLEMEYER: Your Honor, I object to that as  
being  
20 irrelevant. May we approach?  
21 THE COURT: No. I'll sustain the objection.  
22 MR. OHLEMEYER: Thank you.  
23 MS. CHABER: Q. Dr. Horn, you've taken work  
histories  
24 and smoking histories from a fair number of individuals?  
25 A. Yes.  
26 Q. And you've done that in both your work as an expert,  
27 such as you are here, and as a treating physician?  
28 A. Yes.  
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1 Q. And in the course of taking histories, both work  
2 histories and smoking histories, is it part of your  
practice  
3 to evaluate whether or not the information you're obtaining  
4 from people is reliable?  
5 A. Yes.  
6 Q. With respect to Dr. Horowitz and his smoking history,  
7 in your opinion, was Dr. Horowitz's smoking history that he  
8 provided reliable?  
9 MR. BRAKE: Objection, Your Honor. No matter how  
good  
10 an expert you are on a variety of things, and to come in  
and  
11 say I think someone else is telling the truth or not  
telling  
12 the truth seems, to me, an improper question.  
13 MS. CHABER: That's not what I'm asking him, Your  
14 Honor.  
15 THE COURT: You may ask. Overruled.  
16 THE WITNESS: Yes, I thought the information I got  
17 from Dr. Horowitz was very reliable.  
18 MS. CHABER: Q. And did you suggest any of that  
19 information to him?  
20 A. No. When I ask questions, I don't suggest  
21 information. I ask open-ended questions so I can get  
22 information, so that it's not -- they are not leading or  
23 suggestive.  
24 Q. And with respect to asking brands of smoking for  
25 people who have mesothelioma, would you ask that question,  
26 whether the person was sent to you by a lawyer, or whether  
27 another doctor referred that person?  
28 A. Wouldn't matter.  
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1 MS. CHABER: I have nothing further.  
2 CROSS-EXAMINATION BY MR. OHLEMEYER  
3 MR. OHLEMEYER: Q. Dr. Horn, on the subject of  
4 histories, whether it's a smoking history or an  
occupational  
5 history or a medical history, you sit down with one of your  
6 patients and you ask him some questions and they give you

7 some information; is that right?  
8 A. Yes.  
9 Q. Specifically with respect to Dr. Horowitz and his  
10 smoking history, you didn't go out and do any independent  
11 investigation to determine whether Dr. Horowitz did or did  
12 not smoke any particular brand of cigarettes at a  
particular  
13 point in time?  
14 A. Of course not.  
15 Q. And a history is subjective, isn't it?  
16 A. I guess you have to clarify what you mean by that.  
17 Q. Well, it's not -- as you take it, it's not something  
18 that you go out and objectively verify or prove or  
disprove?  
19 A. No, although I often have a factual basis upon which  
I  
20 can determine whether the information I'm getting makes  
21 sense because of my prior experience.  
22 Q. But with respect to a smoking history or even an  
23 occupational history, people give you that information,  
and  
24 that is essentially their recollection of that  
information?  
25 A. Yes.  
26 Q. And recollection can be affected by failure of  
memory?  
27 A. Of course.  
28 Q. It can be -- people can be mistaken about things  
that

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1 they tell you in these histories?  
2 A. Yes.  
3 Q. And the passage of time can affect the accuracy of  
4 recollection and memory?  
5 A. Well, most of us don't remember everything.  
6 Q. Now, yesterday you had the model up there and you  
were  
7 talking about cilia and things like that. Do you remember  
8 that?  
9 A. Yes.  
10 Q. And you talked a little bit about what cigarette  
smoke  
11 may or may not do to people's cilia?  
12 A. Yes.  
13 Q. But the fact is, Doctor, isn't it, that that doesn't  
14 have anything to do with mesothelioma?  
15 A. What doesn't have to do with mesothelioma?  
16 Q. Well, mesothelioma is not associated with cigarette  
17 smoking?  
18 A. Nobody has demonstrated that cigarette smoking, per  
19 se, is in any way related to mesothelioma.  
20 Q. And, in fact, people who smoke are not more likely  
to  
21 develop mesothelioma than people who don't smoke?  
22 A. That's correct.  
23 Q. And there is no evidence that cigarette smoking is a  
24 factor in the development of malignant mesothelioma?  
25 A. In general, that's correct.  
26 Q. You talked yesterday about fiber types, different  
27 types of asbestos.  
28 A. Yes.

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1 Q. And am I correct that in your opinion, all types,  
2 amosite, chrysotile, and crocidolite are capable of causing  
3 mesothelioma?

4 A. That's correct.

5 Q. And when the EPA or OSHA or anybody sets regulatory  
6 standards, they don't distinguish among different types of  
7 fibers, do they?

8 A. In the United States, the fiber types are not  
9 distinguished. The requirements are the same for all fiber  
10 types.

11 Q. Now, you know who Dr. Hammar is, don't you?

12 A. Yes.

13 Q. Dr. Hammar has written this very heavy book on  
14 Pulmonary Pathology?

15 A. Yes.

16 Q. And this is a resource, and Dr. Hammer's book is a  
17 resource you use in your practice?

18 A. Yes.

19 Q. And if Dr. Hammar is of the opinion that there is no  
20 way to distinguish whether one fiber is more or less  
likely

21 than another type of fiber to cause mesothelioma, would  
you  
22 disagree with that?

23 MS. CHABER: Well, I'm going to object. I think  
that  
24 lacks foundation and misstates Dr. Hammer's testimony.

25 THE COURT: Rephrase the question.

26 MR. OHLEMEYER: Q. Let me ask you to assume,  
27 Dr. Horn, that Dr. Hammar is of the opinion that there is  
no  
28 way to make a distinction between the fiber types and  
their

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1 ability to cause mesothelioma. Would you disagree with  
2 that?

3 MS. CHABER: Same objection, Your Honor.

4 THE COURT: Overruled.

5 THE WITNESS: If that's what he believed, I would  
6 disagree with him.

7 MR. OHLEMEYER: Q. And reasonable people can come to  
8 different conclusions about different topics in science and  
9 medicine?

10 A. Well, when there's data in the literature that's  
less  
11 than complete, it's open to interpretation, and different  
12 investigators may interpret the literature differently.  
13 When the data is complete, usually everybody agrees.

14 Q. For example, Dr. Horn, there are investigators and  
15 researchers who have looked at the topic and the subject  
of  
16 whether there is a certain amount of asbestos that's  
17 necessary to cause mesothelioma?

18 A. Some people have expressed the view, based upon  
their  
19 own opinion, not based upon data that they have published  
in  
20 the literature or they reference, in which they believe

21 there's a threshold below which you are not at increased  
22 risk.  
23 Q. And you've read some of those articles?  
24 A. Yes.  
25 Q. And some of those articles are epidemiological in  
26 nature?  
27 A. There are epidemiologic studies that have been done  
28 which have not demonstrated cases of mesothelioma, at  
least

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1 in that population group that had been studied up to that  
2 time.  
3 Q. And some of those researchers have done pathological  
4 investigations to try to answer that question? They have  
5 looked at fiber burden, lung tissue?  
6 A. There are investigators that have done fiber burden  
7 analyses and based upon those analyses, have come to  
certain  
8 conclusions.  
9 Q. And one of the things that you told us yesterday, one  
10 of the subjects that you have not done any original  
research  
11 or published any papers on is the physical dimensions of  
12 asbestos fibers present in the lungs of individuals with  
and  
13 without asbestos-related disease?  
14 A. No, I haven't done any original research on it.  
15 Q. And you're familiar with and recognize, as an  
16 authority, a man by the name of Fred Pooley who has done  
17 some research and published some data on that subject?  
18 A. Yes, he's done a lot of work in which he's measured  
19 fiber size in samples from individuals who had varying  
lung  
20 disease from asbestos.  
21 Q. Now, the majority of mesothelioma in this country is  
22 caused by occupational exposure to asbestos?  
23 A. That's correct.  
24 Q. And you don't know if every case of mesothelioma in  
25 this country is caused by exposure to asbestos?  
26 A. There are clearly individuals who have developed  
27 mesothelioma who have not had an occupational or  
28 paraoccupational exposure to asbestos. I don't know what

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1 the cause of mesothelioma is in those individuals.  
2 Q. The majority of cancers have no known cause?  
3 A. The majority of -- overall? You're asking a general  
4 question?  
5 Q. Yes.  
6 A. Yes, the majority of malignancies do not have a known  
7 cause.  
8 Q. In a tumor or a cancer that has an identifiable  
cause,  
9 for example mesothelioma and asbestos, it's possible, isn't  
10 it, that there may be other causes of that tumor that have  
11 yet to be discovered or identified?  
12 A. Yes.  
13 Q. Not every exposure to asbestos causes mesothelioma?  
14 A. That's right, not everyone who is exposed to  
asbestos

15 develops mesothelioma.  
16 Q. And you don't know why?  
17 A. I don't know why some do and some don't.  
18 Q. And you don't believe that exposure to one asbestos  
19 fiber is sufficient to cause mesothelioma?  
20 A. I think it's doubtful, because in order for a normal  
21 cell to become a malignant cell, multiple changes in DNA  
22 need to occur, and I'm hard-pressed to believe that one  
23 fiber would be responsible for the multiple changes in  
24 specific areas in DNA which need to occur to get a  
malignant  
25 cell.  
26 Q. You think it takes more than one fiber?  
27 A. To answer that question with some reasonable  
28 certainty, I would obviously need to know the mechanism of  
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1 how this happens, and I don't know, nor does anyone else.  
2 But just on the basis of what I know about science and the  
3 epidemiology of this disease, I'm hard-pressed to imagine  
4 that one fiber would do it.  
5 Q. You'll agree with this, won't you, that somewhere  
6 between one fiber and some large number of fibers is the  
7 minimum level of exposure to asbestos necessary to cause  
8 mesothelioma?  
9 A. Yes.  
10 Q. And the things that put somebody at risk for  
11 developing a disease are not necessarily the things that  
may  
12 cause that disease in an individual?  
13 A. Well, that may be so. Its conceivable that there  
are  
14 other factors involved which have yet to be identified  
that  
15 put you at greater risk, so it's not just the specific  
16 agent, but there may well be another factors involved  
which  
17 we don't understand yet.  
18 Q. The ability of asbestos to cause lung disease,  
19 pulmonary disease, depends on the duration and intensity  
of  
20 exposure and the deposition and retention of that asbestos  
21 in somebody's lungs?  
22 A. I would rather put it that your risk for developing  
23 disease from asbestos is a function of the amount of  
24 asbestos you inhale and retain in your lung. And the  
amount  
25 you inhale and retain in your lung will be a function, in  
26 part, regarding the intensity of exposure and the duration  
27 of exposure.  
28 Q. And the risk associated with exposure to asbestos  
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1 depends upon being exposed to single respirable asbestos  
2 fibers?  
3 A. Yes, or at least the body has to be able to break  
them  
4 down into single fibers.  
5 Q. And something that is respirable means more than you  
6 can inhale it?  
7 A. Well, respirable means you would inhale it. In this

8 case, we are talking about fibers that are of a size that  
9 you inhale and retain in your lung, down in the terminal  
10 bronchials, in the very small areas, and in the air sacs  
11 down in your lung.  
12 Q. And the people who are exposed to asbestos can be  
13 exposed to asbestos that is not of a size and of a shape  
14 that it can get to the terminal bronchials and that part  
15 of the lung?  
16 A. That's correct.  
17 Q. And I think you told me earlier that one researcher  
18 who has studied that very subject is Fred Pooley?  
19 A. Yes.  
20 Q. Now, in order for you to reach the opinion that you  
21 gave us yesterday about Mr. Horowitz and Kent cigarettes,  
22 you have to make some assumptions, don't you?  
23 A. Well, I'm relying on the work of Dr. Longo published  
24 in June.  
25 Q. You have to assume that Dr. Horowitz smoked Kent  
26 cigarettes when the filter had asbestos in it?  
27 A. That's right.  
28 Q. You have to assume that the filter released single  
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1 respirable asbestos fibers when it was smoked?  
2 A. Yes.  
3 Q. You have to assume that sufficient number of them  
were  
4 deposited and retained in the lung?  
5 A. That's correct.  
6 Q. So if the filter material didn't release asbestos, it  
7 couldn't have caused the disease?  
8 A. Well, if it didn't release asbestos, I don't quite  
9 know how it would cause disease.  
10 Q. Fair enough. Now, with respect to Dr. Horowitz, you  
11 aren't his family doctor?  
12 A. No, I'm not.  
13 Q. You weren't his treating physician?  
14 A. No,  
15 Q. You weren't involved in his diagnosis or his  
16 treatment?  
17 A. I was not.  
18 Q. And, in fact, you saw him in December?  
19 A. Correct.  
20 Q. And you haven't seen him since?  
21 A. I have not.  
22 Q. Ms. Chaber's office hired you to evaluate some  
medical  
23 records, talk to Mr. Horowitz and his wife and determine  
the  
24 potential exposure to asbestos he might have had in  
25 connection with the lawsuit?  
26 A. Yes.  
27 MR. OHLEMEYER: Let me mark these as the next in  
28 order.

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1 MS. CHABER: May I see them?  
2 MR. OHLEMEYER: Sure.  
3 THE CLERK: Defendants' Exhibit C marked for  
4 identification.

5 (Defendants' Exhibit C marked for identification.)  
6 THE CLERK: Defendants' Exhibit D marked for  
7 identification.  
8 (Defendants' Exhibit D marked for identification.)  
9 THE CLERK: Defendants' Exhibit E marked for  
10 identification.  
11 (Defendants' Exhibit E marked for identification.)  
12 THE CLERK: Defendants' Exhibit F marked for  
13 identification.  
14 (Defendants' Exhibit F marked for identification.)  
15 MR. OHLEMEYER: Thank you.  
16 Q. Dr. Horn, Dr. Horowitz didn't make the appointment  
to  
17 see you, his lawyers did; isn't that right?  
18 A. Well, someone from Ms. Chaber's law office called my  
19 office, and an appointment was arranged.  
20 Q. Let me hand you what we've marked as Defendants'  
21 Exhibit C.  
22 A. Yes.  
23 Q. That is a letter from your office to Dr. Horowitz?  
24 A. Right.  
25 Q. That states that his attorneys have made an  
26 appointment for him to see you?  
27 A. Right.  
28 Q. For pulmonary function tests, chest x-rays, and to  
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1 talk with you?  
2 A. Right.  
3 Q. Who did the x-rays?  
4 A. The hospital.  
5 Q. Particular doctor at the hospital that does them?  
6 A. The doctors interpret them, they don't do them. You  
7 wouldn't want the doctors to do them.  
8 Q. Fair enough.  
9 Who interpreted them?  
10 A. The x-ray was interpreted by -- well, by myself and  
11 the radiologist that interpreted the x-ray was Norman  
12 Moscow.  
13 Q. Who's Dr. Moscow?  
14 A. Dr. Moscow is one of the radiologists at Alta Bates.  
15 He actually is the head of the department of radiology  
there  
16 and is a government certified B reader.  
17 Q. And they then provided you with a report that you  
18 attached to your report?  
19 A. Right.  
20 Q. And what does Dr. Moscow say in his report about  
21 evidence of interstitial lung disease, pleural  
abnormality,  
22 or benign asbestos-related disease?  
23 A. There is none.  
24 Q. Let me hand you what's been marked as defendants'  
25 Exhibit D. This is a letter from -- to Mr. Horowitz from  
26 his attorneys that they copied you on?  
27 A. Right.  
28 Q. And this is to let Dr. Horowitz know where your  
office

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1 is and what time he should be there?

2 A. Right.  
3 Q. And the re line on that letter says what, Doctor?  
4 A. "Medical examination for asbestos lawsuit."  
5 Q. Then on December 5th -- let me hand you Defendants'  
6 Exhibit E. You were sent some x-rays and other medical  
7 records from Mr. Horowitz's attorneys?  
8 A. Well, I was sent medical records.  
9 Q. Do you see the beginning of the second paragraph  
there  
10 where it says that "Dr. Horowitz is concerned about the  
11 numerous sets of x-rays he is undergoing" --  
12 A. Yes.  
13 Q. -- "so he will be bringing a very recent CXR," which  
14 means chest x-ray --  
15 A. Yes.  
16 Q. -- "study"?  
17 A. Yes.  
18 Q. Did you and Dr. Horowitz talk about his concern  
about  
19 those x-rays?  
20 A. I guess we did. I don't remember.  
21 Q. You don't remember discussing that with him?  
22 A. No.  
23 Q. Then on December 9th, the Horowitzes came to see  
you?  
24 A. Yes.  
25 Q. And let me hand you Defendants' F. You asked  
26 Dr. Horowitz to fill out a questionnaire?  
27 A. Right.  
28 Q. And on the back page of that questionnaire -- by the  
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1 way, did he fill it out or did you or one of your staff  
2 record the answers for him?  
3 A. No, either he filled it out or his wife filled it  
out.  
4 We didn't fill it out.  
5 Q. On the back page there is a chart. Is that a chart  
6 that your office has prepared?  
7 A. Yes.  
8 Q. And the chart asks Dr. Horowitz to fill out, from his  
9 current job and go backwards, the company and location  
where  
10 he worked, the type of industry it was, the period he  
worked  
11 there, his job title, his job description, the hours per  
12 week he worked, exposures and protective measures?  
13 A. Right.  
14 Q. And by exposures, what is it that you intend?  
15 A. Well, it would depend upon what the issue is. So  
for  
16 instance, if I were seeing somebody because of an issue  
17 regarding asbestos, I would hope they would include that,  
18 whether they were exposed. If I saw somebody with coal  
19 workers' pneumoconiosis, that was the issue, they would  
put  
20 where they had been exposed to coal. If the issue were  
21 occupational asthma and they were exposed to a particular  
22 agent that causes it, that they would identify in that  
space  
23 what they were exposed to.  
24 Q. What did Dr. Horowitz identify in that space?



25 A. Nothing.  
26 Q. Now, at the time that you saw Dr. Horowitz, you knew  
27 there had been a lawsuit filed?  
28 A. Well, I don't know if I knew a lawsuit was filed. I  
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1 knew I was seeing him for the purpose of potentially a  
2 lawsuit being filed.  
3 Q. Did you know who any of the defendants to that  
lawsuit  
4 might have been?  
5 A. No.  
6 Q. You took what you've described as a smoking history  
7 from Dr. Horowitz?  
8 A. Yes.  
9 Q. And that's not unusual, you take smoking histories  
10 from all your patients?  
11 A. Every patient I see.  
12 Q. And Dr. Horowitz told you that he began smoking  
13 cigarettes sometime in the middle '40s?  
14 A. 1944.  
15 Q. Quit sometime in the early '60s?  
16 A. New Years' Day 1963.  
17 Q. That's what he told you?  
18 A. Right.  
19 Q. And he told you that he quit when he first became  
20 aware of the effects associated with smoking?  
21 A. Right.  
22 Q. He told you what brands of cigarettes he smoked over  
23 the years?  
24 A. Right.  
25 Q. He told you that he smoked Old Gold, Lucky,  
26 Chesterfield and Kent?  
27 A. Correct.  
28 Q. And he told you that he started smoking Kent  
sometime

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1 after he moved to Cleveland?  
2 A. Right.  
3 Q. And he moved to Cleveland in 1952?  
4 A. In February 1952.  
5 Q. And that he smoked Kents until he quit smoking?  
6 A. Correct.  
7 Q. And that when he started smoking Kent, the filter was  
8 pale blue?  
9 A. Right.  
10 Q. And that the filter -- the color of the filter  
changed  
11 to white, four to five years after he started smoking?  
12 A. Right.  
13 Q. And that he smoked less than a pack a day?  
14 A. Well, from '52 to '63, he smoked about a pack a day.  
15 Q. In your report that you prepared and sent to  
16 Ms. Chaber, you note the fact that Dr. Horowitz described  
17 the color of the filter and the change in the color of the  
18 filter?  
19 A. Right.  
20 Q. Why did you do that?  
21 A. I thought that was very interesting information. I  
22 never heard that from anybody before and I didn't know

that

23 myself, and I thought that that was very fascinating  
24 information. It demonstrated he was very alert, and I  
25 thought that represented the fact that the smoking history  
I  
26 was getting was accurate.  
27 Q. You told Dr. Horowitz, then, that there was asbestos  
28 in the filter material used in Kent cigarettes?

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1 A. Yes.  
2 Q. And that was something that was news to him?  
3 A. I don't remember that.  
4 Q. You talked with Dr. Horowitz about his work history?  
5 A. Yes.  
6 Q. He told you that he was on a troop ship in 1946?  
7 A. Correct.  
8 Q. And that there were steam pipes in poor repair on the  
9 ship?  
10 A. Right.  
11 Q. He told you that --  
12 A. Well, actually, he said that the whole ship was in  
13 poor repair.  
14 Q. And why is that significant?  
15 A. Well, I think he was exposed to asbestos during that  
16 time. Ships vibrate and asbestos-containing materials  
that  
17 are on pipes deteriorate because of the vibration in the  
18 steam lines, and free asbestos fibers are liberated in  
that  
19 situation aboard ship. The worse shape the ship is in,  
20 probably the greater the exposure one would have.  
21 Q. Dr. Horowitz told you about the construction that  
was  
22 ongoing near his places of employment in Cleveland and Los  
23 Angeles?  
24 A. Yes.  
25 Q. And he told you about the possible presence of  
26 asbestos in his [DELETED] home?  
27 A. Yes.  
28 Q. Did you tell him that the troop ship, the  
construction

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1 sites, and the pipe coverings in his home were potential  
2 sources of exposure to asbestos?  
3 A. I don't recall if I did that.  
4 Q. You looked at some of Dr. Horowitz's medical records?  
5 A. Yes.  
6 Q. And there's nothing in those medical records to  
7 indicate a history of exposure to asbestos?  
8 A. That's correct.  
9 Q. Now, let's talk about Dr. Longo for a minute. The  
10 information about Dr. Longo's experiment was sent to you  
by  
11 Mr. Horowitz's attorneys?  
12 A. Yes.  
13 Q. And designing or conducting that kind of an  
experiment  
14 is not something within your area of expertise?  
15 A. That's correct.

16 Q. And you don't have -- you haven't seen a videotape  
of  
17 his experiment?  
18 A. No.  
19 Q. You haven't seen the photographs of his experiment?  
20 A. Well, there were some photographs published in the  
21 article.  
22 Q. But you haven't seen the photographs of how the  
23 experiments was conducted?  
24 A. No, I have not.  
25 Q. You haven't looked at the data from the raw  
26 experiment?  
27 A. Well, I saw a preprint. There was data in the  
28 preprint.

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1 Q. But have you seen Dr. Longo's accounting sheets where  
2 the size and shape of the asbestos structures he observed  
3 were described?  
4 A. No.  
5 Q. Now, you do know that Dr. Longo's experiment used  
nine  
6 cigarettes?  
7 A. Correct.  
8 Q. From a 40-year-old pack?  
9 A. Correct.  
10 Q. With an unknown history?  
11 A. I don't know what you mean by "an unknown history."  
12 Q. Do you know anything about the history of that pack,  
13 where had it been over those 40 years?  
14 A. No. Well, in his article, he indicated that a  
15 collector had the packs.  
16 Q. And you know that he smoked those cigarettes by hand  
17 in a syringe?  
18 A. Right.  
19 Q. Now, let me ask you to make some other assumptions,  
20 Dr. Horn.  
21 Let me ask you to assume that at the time Dr. Longo  
22 did this experiment, there were machines available to  
23 mechanically smoke cigarettes, and that there were  
published  
24 standards that one could refer to that describe how  
25 cigarettes should be smoked on a machine for analytical  
26 purposes.  
27 And let me ask you to assume that at the time  
28 Dr. Longo did this experiment, he hadn't seen such a  
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1 machine, he hadn't used such a machine in the experiment,  
2 and he hadn't read those published standards.  
3 Let me also ask you to assume that it took between 30  
4 seconds and almost two minutes to insert the cigarettes  
into  
5 the syringe before they were smoked.  
6 Let me also ask you to assume that several of the  
7 cigarettes were pinched or rolled by hand before they were  
8 inserted into the syringe.  
9 Let me ask you to assume that Dr. Longo did no test  
to  
10 determine whether inserting the cigarettes into the  
syringe

11 could account for the asbestos structures he observed in  
the  
12 syringe.

13 Let me ask you to assume that the cigarettes were  
14 smoked by sealing the cigarette in the syringe with  
silicone  
15 caulk, lighting them, pulling the plunger to puff them by  
16 hand, letting the syringe sit for up to 90 minutes or, in  
a  
17 couple of cases, several days, removing the caulk,  
removing  
18 the cigarette, repeating the process again, and that  
19 before --

20 Let me ask you to also assume that before Dr. Longo  
21 examined the contents of the syringe, he introduced some  
22 water into it, shook it up for ten seconds, let it sit,  
23 shook it up for ten more seconds, let it sit.

24 And let me ask you to assume, also, that three years  
25 after Dr. Longo did the experiment with the syringe, he  
took  
26 one cigarette that had been in his drawer for a few years,  
27 two cigarettes from the same 40-year-old pack that had  
been  
28 used in the syringe experiment, and used a smoking  
machine,

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1 and that when he examined the results of that experiment,  
in  
2 which he again did not do any tests to determine whether  
3 inserting the cigarettes into the machine could account for  
4 the structures he observed, the results he found were a  
5 fraction of what he got in the syringe experiment.

6 And finally, let me ask you to assume that  
7 Dr. Frederick Pooley, who we talked about earlier, has  
8 looked at the videotape, has looked at the data, has looked  
9 at the photographs, and has concluded that they provide no  
10 evidence of respirable asbestos fibers that might have  
been

11 released from the smoke of these cigarettes.

12 If you make all those assumptions, Dr. Horn, in  
13 addition to the ones you told us earlier you had made in  
14 providing Ms. Chaber with your opinion, might they affect  
15 your opinion about the capability of Kent cigarettes  
causing

16 Dr. Horowitz's mesothelioma?

17 MS. CHABER: Your Honor, I just want to interpose an  
18 objection on the assumption that it lacks foundation in  
19 numerous aspects, and particularly lacks foundation that  
20 there are any published standards for or any smoking  
machine

21 designed to analyze the presence of asbestos fibers in  
smoke

22 as improper, no foundation, lacks foundation with respect  
to  
23 that information. Cigarette smoking machines are designed  
24 for tar and nicotine content.

25 MR. OHLEMEYER: Your Honor, that's not an objection,  
26 that's a speech.

27 THE COURT: I don't know whether there are standards  
28 for testing or not.

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1 MR. OHLEMEYER: I'll prove it up. All I'm asking him  
2 to do is assume all that.

3 THE COURT: Well, assume it. All right.

4 MR. OHLEMEYER: Q. Do you have the hypothetical?

5 THE COURT: You can ask other appropriate questions  
in

6 redirect examination, I guess. Overruled.

7 THE WITNESS: I've got it.

8 MR. OHLEMEYER: Q. Okay. And the answer?

9 A. It might.

10 Q. Thank you.

11 Let me ask you do assume one other thing, Dr. Horn.

12 Assume that Dr. Horowitz didn't smoke Kent cigarettes when  
13 there was asbestos in the filter. Do you have an opinion

as

14 to what might have caused his mesothelioma?

15 A. Then his other exposures would have caused it.

16 Q. In your opinion, does Dr. Horowitz have an  
17 asbestos-related mesothelioma, whether he smoked Kent  
18 cigarettes or not?

19 A. Yes.

20 MR. OHLEMEYER: Thank you, Doctor.

21 CROSS-EXAMINATION BY MR. BRAKE

22 MR. BRAKE: Q. Doctor, if I were to get that

light

23 box for getting x-rays out here, would you be able to put

24 your hands on the ones we looked at yesterday?

25 A. Sure.

26 Q. I wanted to ask you a couple of things.

27 THE COURT: If anybody wants to stand up and

stretch,

28 please do so. We are not going to take a recess because  
we

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1 want to finish with the Doctor this morning.

2 MR. BRAKE: Q. Doctor, you had one x-ray, I think,  
3 from January '95 that you showed us yesterday of  
4 Dr. Horowitz's chest?

5 A. The chest film or the CT scan?

6 Q. The chest film.

7 A. Sure.

8 Q. And you told us, did you not, that looking at that,  
9 you could tell us that Dr. Horowitz had pneumonia in  
10 January?

11 A. Yes.

12 Q. How do you know that?

13 A. I have the CT scan. I know he had the CT scan about  
14 the same time. Just for the sake of time, I didn't show  
it

15 to the jury, but he had a significant part of what's in  
here

16 represents pneumonia.

17 Q. And I guess what I'm asking is, what is it you see  
on  
18 that film that would indicate pneumonia?

19 A. Well, there is the pleural base disease around the  
20 outside of the lung. Let's go back a film. Here's  
21 November. In November of '94, he's got disease around the  
22 lining of the lung, and it's on this side, and it's

sitting

23 up in here. It's in the fissure over here. It's  
24 undoubtedly on this side, as well, but I can see air down  
25 here. There's air from here to here.

26 In here, I now have density down here. It's now  
white

27 down here, and this could represent collapse of the lung  
28 from the tumor, with the tumor growing, or it represents  
an

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1 infiltrate, or conceivably could represent invasion into  
the  
2 lung.

3 Q. And the fact that it's white here tells you that  
4 there's something there? Is that the first thing it tells  
5 you?

6 A. Right.

7 Q. And you've --

8 A. It ain't right.

9 Q. Is this called a density or opacity?

10 A. Yes.

11 Q. Is that a term that you would use for that?

12 A. Sure. You could.

13 Q. You could look and see there's a white density and  
14 opacity and, given your expertise, you can infer that's  
15 pneumonia?

16 A. I don't know from this film, but I know it from the  
CT  
17 scan.

18 Q. But does pneumonia typically leave a density or  
19 opacity on a person's x-ray like this?

20 A. Sure, it can look like that.

21 Q. Does it typically look like that? Does it have a  
22 white density or opacity?

23 A. Pneumonia?

24 Q. Yes.

25 A. Yes, because the white means a fluid density other  
26 than air, and pneumonia represents fluid in the lung. So  
27 the way it will show up on x-ray is the x-ray will be  
white.

28 Now, the appearance on the x-ray, what that white  
appearance

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1 will be will vary with different kinds of pneumonia. It  
2 could be in a very discrete area, it can be in a patchy  
sort

3 of way. It varies in appearance, but it will be white.

4 Q. Thanks, Doctor. If you could get the CAT scans out,  
5 if you would -- let's do it orderly. Let's start of with  
6 June of '94. Could you do that?

7 A. Sure.

8 Q. These are all the CAT scans that were taken of  
9 Dr. Horowitz in June of 1994?

10 A. There are more cuts. There's more. This is what I  
11 pulled out to show the jury.

12 Q. Now, do you know how many total images were taken of  
13 him in June of 1994, approximately?

14 A. How many images?

15 Q. Let's see. We've got --

16 A. Let's start up here. So they start at number 1 and  
17 they extend to number 35. So these are the images, and  
then  
18 you can make them smaller, you can make it bigger. There  
19 are -- somewhere the density is different. They are done  
to  
20 look at the lung rather than the lining of the lung. I  
21 pulled out the ones here, you can more easily see the  
lining  
22 of the lung. So technically, there are 35 images.  
23 Q. And from those 35 images, you can generate any  
number  
24 of CAT scan pictures?  
25 A. Yes. You just have the computer do different  
things,  
26 and you wind up with different pictures.  
27 Q. And just so we are clear here, in the June of 1994  
28 one, there's no evidence of any of the -- I think it was  
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1 called faint lacy pleural calcification?  
2 A. I don't see it.  
3 Q. And the people who took these at Tower Imaging, they  
4 didn't comment that they saw it either, did they?  
5 A. Correct.  
6 Q. Thanks. In June of -- in January of '95, you have  
two  
7 images in which the faint lacy calcification is noticed; is  
8 that correct?  
9 A. That's correct.  
10 Q. If Dr. Horowitz had what you called a pleural plaque  
11 or a calcification in January of '95, he would also have  
had  
12 it in June of 1994, wouldn't he?  
13 A. That's correct.  
14 Q. And if he had it, indeed, it should have shown up on  
a  
15 CAT scan?  
16 A. Well, I might have expected to see it, although in  
the  
17 face of the fluid density superimposed on top of a  
18 diaphragm, it may not be dense enough to see it. For  
19 instance, there's some little white ditzels (phonetic)  
20 sitting in here which may represent it, and I could not  
see  
21 it maybe because of the impact of the fluid density  
22 superimposed on the diaphragmatic density.  
23 Q. When you look at the June 1994 CAT scan, you do not  
24 see calcification; correct?  
25 A. I don't clearly see it.  
26 Q. And there's no explanation you could think of for  
why  
27 that's so?  
28 A. That's about the only explanation I could come up  
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1 with.  
2 Q. Remember I asked you at your deposition if there was  
3 any explanation you could think of why, in 1994, it wasn't  
4 noticed, and you said that there was no explanation you  
5 could think of?

6 A. I don't remember.  
7 Q. The only one you could think of today is the presence  
8 of the tumor obscures it in some fashion?  
9 A. And the fluid, the fluid density superimposed on top  
10 of the diaphragm, you just can't pull it out.  
11 Q. Now, Doctor, so this is June, and then we have  
12 January, and then the next set he had was taken in April?  
13 A. April, right. Do you want to see that?  
14 Q. Well, if you want to, we can but I guess I can just  
15 ask you: There was no calcification in April, either, was  
16 there?  
17 A. I don't see it in April, but the problem is, is that  
18 down in the lower end of the chest, the CT scans were done  
19 every two centimeters instead of every centimeter, and the  
20 key area was missed -- just by luck it was missed. It was  
21 in between the area where the calcification was seen in  
22 January was between the cuts that were done in April.  
23 Q. Are you telling us that the faint lacy calcification  
24 was just one centimeter thick?  
25 A. Yes, because it's sitting on the diaphragm, which is  
26 in a plane like this, and that's the plane that the cuts  
are  
27 done. So if you're a little above it or a little below  
it,  
28 you're going to miss it.

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1 Q. And then in June of '95, another set of CAT scans was  
2 taken, too; right?  
3 A. That's right.  
4 Q. And they didn't see the lacy calcification on that  
5 one, either?  
6 A. No, the same thing happened. The cuts were done in  
7 exactly the same way, and at the base of the lung they were  
8 done every two centimeters rather than every centimeter,  
and  
9 they missed the area.  
10 Q. Now, how many images did they take in June,  
11 approximately, do you know?  
12 A. We could get it out. We can look. I don't know.  
13 Q. Why don't you have a seat, and I'll ask you just a  
14 couple more.  
15 Do you know they took approximately 35 images in  
June?  
16 A. I don't know. We can count them.  
17 Q. Can you check it real quick for me?  
18 A. Sure.  
19 Q. Where's your thing with the images?  
20 A. Well, it's in one of those folders over there. I  
21 didn't pull it out.  
22 Q. I see.  
23 A. I can get it.  
24 Q. That's okay. Do you have any reason to think -- go  
25 ahead and have a seat. Perhaps we can move the light box.  
26 Do you have any reason to believe they wouldn't have  
27 taken approximately 35 images in April and June of '95,  
just  
28 as they had done in January?

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1 A. Approximately. But they, instead of doing the images



2 every centimeter, which they did in the middle of the  
chest,  
3 in the lower end of the chest they did them every two  
4 centimeters, both in April and in June.  
5 Q. And just so it's clear, if Dr. Horowitz had a  
6 calcification in January of '95, he would also have had it  
7 in April of '95 and in June of '95?  
8 A. That's right. So theoretically, he could use a  
9 helical CT scanner which, in one breath, they could do  
10 multiple images down at the base of the chest and get it.  
11 Q. If somebody did that, they would be able to get a  
12 photograph, a CAT scan, of that calcification again?  
13 A. That's right.  
14 Q. Now, let me show you June 14th, 1995, and ask you if  
15 you've seen that before, if you know what that is?  
16 A. Yes, I have.  
17 Q. And what is that?  
18 A. This is the report of the CT scan dated June 14th,  
19 1995, from Tower Imaging in Los Angeles.  
20 Q. And Counsel asked you to read from the January one,  
21 right, about how they had noticed a faint, somewhat lacy  
22 calcification?  
23 A. Right.  
24 Q. Can you tell the jury what they commented on that  
25 issue in this June 1995 report?  
26 A. The calcification seen in the pleural mass in the  
27 right costophrenic sulcus on the previous examination are  
no  
28 longer visualized.

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1 Q. So what they are telling us is what they saw in  
2 January by way of calcification, they didn't see in June;  
3 correct?  
4 A. Correct.  
5 Q. And you're telling us that it should have been  
obvious  
6 to them why that was, because they didn't take the picture  
7 in the right place; correct?  
8 A. Right.  
9 Q. The fact is that they took another -- in fact, three  
10 out of four sets of CAT scans that he had taken show no  
11 calcification?  
12 A. That is correct.  
13 MR. BRAKE: If Your Honor could give us a moment to  
14 move the box before I resume.  
15 THE COURT: All right.  
16 MR. BRAKE: Q. Doctor, just a couple other  
things.  
17 With regard to Dr. Longo's report, you relied upon that in  
18 giving your opinions, you told us? You relied upon, in  
19 particular, a 1991 article?  
20 A. 1995 article.  
21 Q. Yes, I'm sorry, a study of a test of nine cigarettes  
22 done back in 1991?  
23 A. That's correct.  
24 Q. And it's clear, isn't it, that you haven't relied,  
in  
25 giving your opinion, upon any results of subsequent tests  
26 that Dr. Longo did of three cigarettes?  
27 A. That's correct.  
28 Q. You didn't consider that; correct?

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- 1 A. Well, I haven't seen the data.  
2 Q. Nobody is asking you to give opinions in this case --  
3 nobody provided you with Dr. Longo's test of three  
4 cigarettes in 1994?  
5 A. I just saw it very briefly yesterday. I would need  
to  
6 read it.  
7 Q. Now, and how did you come to see it yesterday?  
8 A. When I was sitting in court waiting to testify.  
9 Q. Now --  
10 A. Or rather outside the court waiting to testify.  
11 Q. Now, you provided a lengthy report, I think it's 16  
12 pages of text in this case, in January of '95; is that  
13 right?  
14 A. That's correct.  
15 Q. Comprehensive report, is that fair to say?  
16 A. Well, it includes all the information I had  
available  
17 at the time.  
18 Q. And it recounts your discussions with Dr. Horowitz?  
19 A. Correct.  
20 Q. And you state your conclusion, don't you, that  
21 Dr. Horowitz has an asbestos-caused mesothelioma?  
22 A. That's correct.  
23 Q. And all of his exposures up to ten years prior to  
his  
24 diagnosis, in your phrase, should be considered a  
25 contributing factor in the development of his malignancy;  
26 correct?  
27 A. Correct.  
28 Q. You didn't rank the exposures in this report, did  
you?

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- 1 A. No.  
2 Q. But you came into court and ranked them for us on  
3 direct examination; correct?  
4 A. Well, I was asked to.  
5 Q. Back in January you weren't asked to do that; is that  
6 correct?  
7 A. Correct.  
8 Q. I imagine you get asked this all the time, but very  
9 briefly, you have a separate corporation set up for the  
10 revenues you derive from testifying in court; is that  
11 correct?  
12 A. That's correct.  
13 Q. You and one other doctor?  
14 A. Right.  
15 Q. And you do most of the work?  
16 A. I do the medical-legal work. He does other  
17 activities.  
18 Q. And in recent years, you have generated at least on  
19 the order of 150,000 a year from this type of work?  
20 A. That's correct.  
21 Q. And that's been so for about seven years?  
22 A. Roughly.  
23 Q. So taken together, that's something in excess of a  
24 million dollars?  
25 A. That's correct.

26 Q. Doctor, you told us, one last thing, that  
27 Dr. Horowitz's malignancy would have begun in excess of  
ten  
28 years ago. Do you remember saying that?

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1 A. Yes.

2 Q. And you understand that the issue of when the  
3 malignancy first appeared can have some legal significance  
4 in these cases?

5 A. Yes.

6 Q. And with particular reference to a date in 1986;  
7 correct?

8 A. Yes.

9 Q. And indeed, you've known of the legal significance of  
10 this date back into the 1980s; correct?

11 A. Correct.

12 Q. And it used to be when you testified in asbestos  
13 cases, up until about 1993, you used to testify that  
14 malignancy took about seven to eight years to develop?

15 A. From the time from the first cancer cell to the time  
16 of diagnosis or death was in the order of seven to eight  
17 years, that's correct.

18 Q. That used to be your testimony; correct?

19 A. Right.

20 Q. And that was up until about 1994, and then what you  
21 did is you went back and did some more research?

22 A. In late 1993, somewhere around that range, lawyers  
23 began asking me about this in great detail, and began in  
24 much more detail than I was able to answer, so that really  
25 precipitated me going back to the literature to see  
whether

26 there was any information that I didn't know up until that  
27 time that would alter my opinion in some way.

28 Q. And then you went back and you found an article by a  
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1 Dr. Chahinian?

2 A. I found a whole series of articles by Dr. Chahinian,  
3 who is an oncologist at Mount Sinai in New York City.

4 Q. And basically, on Dr. Chahinian's work, you have now  
5 concluded it takes more than ten years for the malignancy  
to  
6 develop?

7 A. That's correct. From the first cancer cell to the  
8 time of diagnosis or death, takes at least ten years.

9 Q. And Dr. Chahinian's work was published and available  
10 back in the 1980s, wasn't it?

11 A. Right, although I didn't know about it.

12 Q. And it was taking -- June of 1986 was about seven or  
13 eight years after that that you went back and did some  
14 research on this issue; correct?

15 A. Well, it was about seven or eight years after that  
16 that attorneys such as yourself began asking me questions  
in  
17 great detail, which sort of precipitated that.

18 Q. Seven or eight years after the June 1986 date you  
went  
19 back and did the research?

20 A. Right.

21 Q. Doctor, that's all I have.

22 REDIRECT EXAMINATION BY MS. CHABER  
23 MS. CHABER: Q. Dr. Horn, you responded to a  
rather  
24 long hypothetical of Mr. Ohlemeyer's --  
25 A. Right, long.  
26 Q. -- and saying that perhaps your opinion might be  
27 changed. Were you indicating that every single one of the  
28 things that he asked you to assume if they were true, were  
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1 all factors in changing that?  
2 A. You mean in terms of why I said it might?  
3 Q. Yes.  
4 A. No, it wasn't all of those issues.  
5 Q. Okay. And is there anything in particular that might  
6 affect it?  
7 A. Well, I'm interested in the issue as to whether you  
8 take the end of the cigarette and you -- if Dr. Longo had  
9 some considerable difficulty in getting it into the  
syringe,  
10 what impact that might have had on the release of fibers.  
11 Q. Have you seen people smoke?  
12 A. Yes.  
13 Q. Have you seen people hold the filter cigarettes?  
14 A. Yes.  
15 Q. Have you seen people roll filter cigarettes?  
16 A. Yes.  
17 Q. Have you seen people put filter cigarettes in their  
18 teeth?  
19 A. Yes.  
20 Q. And hold them there?  
21 A. Yes.  
22 Q. It's been a long time since I smoked. This is hard  
to  
23 do. Have you seen people pinch the ends of cigarettes?  
24 A. Yes.  
25 Q. And have you seen people fidget with cigarettes when  
26 they are smoking?  
27 A. Yes.  
28 Q. Do you believe that that might affect the release of  
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1 asbestos in the filter if people did those?  
2 A. Well, if I believe what Dr. Longo published, and I  
do,  
3 it doesn't appear that rolling or pinching the end of the  
4 cigarette has any significant impact in the release of  
5 fibers. Whether you fool with it or not, fibers are  
6 released.  
7 Q. And the journal that Dr. Longo published in Cancer  
8 Research, is that a recognized journal?  
9 A. Yes.  
10 Q. Did Dr. Longo describe the process of how he did the  
11 experiment?  
12 A. Yes.  
13 Q. And that's described in the article?  
14 A. Yes.  
15 Q. So when Mr. Ohlemeyer, as he's been wont to do for  
the  
16 last couple of days, keeps throwing this syringe around,  
17 that wasn't a surprise to you that there was a syringe

18 involved, was there?  
19 MR. OHLEMEYER: That's kind of argumentative, Your  
20 Honor.  
21 THE COURT: It's been asked. He can answer it.  
22 THE WITNESS: Yes, a syringe was an important  
23 component of the experiment. That provided the negative  
24 force so that air would go through the cigarette while it  
25 was burning.  
26 MS. CHABER: Q. And do you know whether or not a  
27 smoking machine has a tube that looks just like a syringe?  
28 A. I have no idea.  
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1 Q. You don't know what smoking machines were designed to  
2 do, do you?  
3 A. No.  
4 Q. And do you know anybody that smokes like a machine?  
5 A. I believe I've seen people who have smoked like a  
6 machine, yes.  
7 Q. And I want you to assume that there were cigarette  
8 experiments on Kent cigarettes with the asbestos filter  
done  
9 at the defendants' request in 1954 regarding the release of  
10 asbestos fibers from the Kent filter cigarettes. And I  
want  
11 you to assume further that the scientists doing that study  
12 indeed did find and photograph asbestos fibers under an  
13 electron microscope.  
14 Does that have any impact on your opinions regarding  
15 whether or not Kent cigarettes would be capable of  
releasing  
16 asbestos fibers?  
17 A. Well, that would be confirmatory information that  
the  
18 studies done by Dr. Longo are valid.  
19 Q. Let me ask you a couple of questions. Cigarette  
20 smoking, is that a factor in the development of other  
21 asbestos-related diseases?  
22 A. Yes.  
23 MR. OHLEMEYER: Objection, Your Honor; relevance.  
24 THE COURT: Sustained.  
25 MS. CHABER: My client has, in this Doctor's  
opinion,  
26 other asbestos-related diseases, Your Honor.  
27 THE COURT: We are not talking about other diseases  
28 here.

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1 MS. CHABER: Well, they are relevant to his case,  
2 absolutely, Your Honor, pleural plaque.  
3 THE COURT: Restate the question.  
4 MS. CHABER: Q. Dr. Horn, does cigarette smoking  
5 create -- strike that.  
6 Is cigarette smoking a factor in the development of  
7 other asbestos-related diseases other than mesothelioma?  
8 MR. OHLEMEYER: Same objection, Your Honor.  
9 THE COURT: Sustained.  
10 MS. CHABER: Q. Can cigarette smoking affect the  
11 ability of the lung to retain asbestos fibers?  
12 A. Yes.  
13 Q. Does the retention of asbestos fibers, can it result

14 in the development of other asbestos-related diseases  
15 besides mesothelioma?  
16 A. Yes.  
17 Q. And what diseases can it relate to?  
18 A. The asbestos or the smoking or -- I'm not sure I  
19 understand your question.  
20 Q. The asbestos, what other asbestos-related diseases  
21 besides mesothelioma?  
22 A. Are there?  
23 Q. Yes.  
24 A. There are benign asbestos-related diseases; that is,  
25 individuals who are exposed to asbestos can develop a  
number  
26 of different nonmalignant changes of the pleura, including  
27 pleural plaques. Individuals who are exposed to asbestos  
28 can develop scarring in the lung. That disease is called  
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1 asbestosis. Individuals who are exposed to asbestos can  
2 develop a variety of malignancies, not just mesothelioma,  
3 but also lung cancer and other malignancies, as well.  
4 Q. And can two workers who are working side by side and  
5 have this same exposure have different responses to that  
6 exposure?  
7 A. Of course.  
8 Q. And have you seen instances where you've gotten work  
9 histories from people that have been the same as work  
10 histories from other people and they have different  
11 diseases?  
12 A. I have seen an enormous number of people who have  
13 worked at the local federal civilian shipyards, that is  
14 Hunters Point and Mare Island. I've seen an enormous  
number  
15 of people who have had virtually identical jobs. They  
have  
16 done the same thing for the same length of time. Some of  
17 those individuals have no disease whatsoever. Others have  
18 one asbestos-related disease, others have multiple  
19 asbestos-related diseases.  
20 Individuals who are working in the -- virtually the  
21 same environment are all at risk for developing  
22 asbestos-related disease, but there appears to be some  
23 differences between us, so that some of us are more  
24 sensitive than others.  
25 Q. Is pleural plaques, calcified pleural plaque, is  
that  
26 a life-threatening disease?  
27 A. Generally no, although individuals can have  
extensive  
28 enough plaque so they can be quite impaired. And if it's  
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1 very bad, it could theoretically be life-threatening or at  
2 least contribute to your dying.  
3 Q. Let's talk about a plaque about the size of the one  
4 that you saw in January of 1995. Would that be  
5 life-threatening?  
6 A. No.  
7 Q. Is that anything that warrants any medical treatment  
8 or care?  
9 A. No.

10 Q. Would there be any reason for his treating  
physicians  
11 to spend a lot of time looking for that plaque?  
12 A. No.  
13 Q. You were asked about the chest x-rays done at Alta  
14 Bates.  
15 A. There were x-rays done at Alta Bates.  
16 Q. And you were asked that -- whether or not the x-rays  
17 stated there was pleural disease on them.  
18 A. Correct.  
19 Q. And is there a difference between the ability to  
20 visualize pleural disease on x-rays and CT scans?  
21 A. Yes, CT scans are a much more sensitive for  
22 identifying pleural disease.  
23 Q. And why is that?  
24 A. Because normal, regular chest x-rays are two  
25 dimensional, but people are three dimensional, so the  
x-rays  
26 collapse all of the shadows on top of one another, and it  
27 can be a challenge to pick up abnormalities in the pleura  
28 when the shadows are superimposed on top of one another.

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1 And unless the -- unless the pleural plaques are very  
2 extensive or very heavily calcified or are in certain areas  
3 of the chest, you often miss them on regular chest x-rays  
4 where you would see them on a CT scan.  
5 Q. Are there any studies looking at whether or not  
6 individuals who have not been diagnosed with benign  
7 asbestos-related diseases on chest x-ray, whether or not  
8 they actually have them on autopsy?  
9 A. Yes.  
10 MR. BRAKE: Objection, Your Honor. That's leading.  
11 THE COURT: Don't lead him, please.  
12 MS. CHABER: Q. What studies are you familiar with  
13 on that issue?  
14 A. I can't specifically identify any right now, but I  
15 mean, it's well-known that individuals can have plaque at  
16 autopsy, and you don't see them on regular chest x-ray.  
17 I've seen that myself.  
18 Q. Is the same thing true with respect to asbestosis?  
19 A. Yes.  
20 Q. Does calcification, from whatever source it came  
from,  
21 go away?  
22 A. Calcification doesn't go away.  
23 Q. So if Dr. Horowitz had a calcification in January of  
24 '95, he'd have one today?  
25 A. Right.  
26 Q. If you could find the cuts or the part of the CT  
scan  
27 that shows where the cuts are made in the January, the  
April  
28 and the June '95 films. You may need some of these down  
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1 here. Do you think you have all of them?  
2 A. I'm not sure.  
3 THE COURT: I think we are going to have to take a  
4 brief recess here, if you don't mind.  
5 MS. CHABER: Sure. We could get this set up in the

6 break.  
7 THE COURT: Please keep in mind the admonitions given  
8 to you before each and every time you've taken a recess,  
and  
9 please return to your seats as soon as you have taken the  
10 recess.  
11 (Recess taken.)  
12 THE COURT: Everybody is present, so you may resumed  
13 your examination.  
14 MS. CHABER: Thank you, Your Honor.  
15 May Dr. Horn step down?  
16 THE COURT: Yes.  
17 MS. CHABER: Q. Dr. Horn, during the break I asked  
18 you to pull out a couple of CT scans. What films do we  
have  
19 up here?  
20 A. These are all cuts through the lower end of the  
chest.  
21 This was done on January 17th, '95, this was done on April  
22 17th, '95 and this was done on June 14th, '95.  
23 Q. And are those -- it's the January film that had what  
24 you identified as a plaque?  
25 A. Yes, you can see calcification on the January film.  
26 Q. Okay. By the way, when you first looked at that  
film,  
27 I see it has a circle around the area you've described?  
28 A. Right.

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1 Q. Was that circle there?  
2 A. That circle was there. I didn't circle it. It --  
the  
3 circle -- this is a copy, so you can't erase this, so the  
4 circle is on the original.  
5 Q. And are these cuts in similar areas?  
6 A. Various --  
7 MR. BRAKE: Objection, leading, Your Honor.  
8 THE COURT: Don't lead, please.  
9 THE WITNESS: Yes, they are fairly similar. They are  
10 slightly different, but they are pretty close. It's very  
11 difficult to do it precisely in the same place. When you  
12 have people doing this, you have them take a deep breath  
and  
13 hold their breath as the machine goes around over a few  
14 several seconds, and then they breathe and then you have  
15 some hold their breath again, and do the next cut and --  
16 it's very hard for people to take precisely the same  
breath  
17 every time so.  
18 It's difficult from CAT scan to CAT scan to identify  
19 the exact same place on a cut, from exam to exam. It's  
very  
20 difficult to do because people don't breathe exactly the  
21 same, or the disease might change so that they can't  
breathe  
22 exactly the same way.  
23 Q. And are there -- I don't know what they are called.  
24 What are the films called that show the x-ray and where  
the  
25 cuts were actually taken? Does that have a scientific  
26 medical name?  
27 A. I have no idea.



28 Q. That's what I thought.  
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1 A. The x-ray with the cuts on them, that's all.

2 Q. Would you pull them out for the respective dates,  
3 which is January, April and June?

4 A. Well, I don't have the January one here. I have the  
5 April one. So here is the April one and here is the June  
6 one. And aside from the fact that its difficult to line  
7 them up, even when you do them every centimeter. Down at  
8 the base of the chest they do them every two centimeters.  
9 At the top of the chest -- this is the one from April.

10 The cuts are two centimeters apart at the top of the  
11 chest. In the middle of chest they are one centimeter  
12 apart, and down at the base of the chest they are two  
13 centimeters apart.

14 The same thing on the June film, at the top of the  
15 chest they are two centimeters apart, and then the lines

get  
16 much closer together, then they get farther apart. So the  
17 cuts down at the base of the chest don't represent  
18 everything that's going on at the base of the chest,  
19 particularly when the cut is in this plane and the plaque  
is  
20 in this plane.

21 So if the plaque were in this plane like so --

22 Q. You're indicating up and down?

23 A. Up and down, and you're cutting through this way,  
24 you're much more likely to see it. If it's in this plane,  
25 it's much easier to miss. And on the diaphragm, it's on  
26 this plane. So the fact that he can't breathe exactly the  
27 same one of these is done, and the fact that the cuts are  
28 farther apart to reduce his radiation, the reason this was

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1 done, not for the purpose of seeing whether he has plaque,  
2 this was done by his clinicians to determine what was the  
3 status of his disease and how well he was responding to  
4 chemotherapy. So they decreased the number of cuts on top  
5 and bottom to reduce his radiation exposure.

6 Q. And on these two x-ray examples of where the cuts  
are,

7 can you indicate the approximate area, based on where you  
8 saw it in January of '95, where the plaque would be?

9 A. Well, it's somewhere down in here. It's somewhere  
10 around cut 37 on the April and again, cut 37, somewhere  
11 between 35 and 37 on the June film.

12 Q. And do you believe that that explains why there  
would

13 not be able to be -- the plaque would not be able to be  
14 visualized in April and June?

15 A. Yes. The cuts are just not complete, and he  
probably

16 couldn't hold his breath exactly the same way, Dr.  
Horowitz

17 couldn't do it exactly the same way, and the specific area  
18 where the plaque is, which is on the same plane as the  
19 x-ray, is just missed.

20 Q. Didn't go away?

21 A. Calcification in the diaphragm does not go away.

22 Q. And do you know of any other explanation in

23 Dr. Horowitz for the calcification, other than the  
asbestos  
24 you indicated?  
25 A. No.  
26 Q. Thank you.  
27 Just a last question or two. Dr. Horn, you  
indicated  
28 that Dr. Pooley was someone that you were familiar with in  
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1 terms of his writings.  
2 A. I don't personally know him, but I've read a lot of  
3 his writings. I don't know that I've read everything he's  
4 written, but I've read a lot of work in which he's a  
5 co-author.  
6 Q. I want you to assume that Dr. Pooley believes that  
7 chrysotile asbestos does not cause mesothelioma. Is that  
an  
8 opinion that you would agree with with Dr. Pooley?  
9 A. No.  
10 Q. I want you to assume that Dr. Pooley thinks that  
there  
11 are high concentrations of crocidolite asbestos in the air  
12 in North America. Is that an opinion that you would share  
13 with Dr. Pooley?  
14 A. He's wrong.  
15 MS. CHABER: I don't have anything further, Your  
16 Honor.  
17 MR. OHLEMEYER: I just have one, Your Honor.  
18 RE-CROSS-EXAMINATION BY MR. OHLEMEYER  
19 MR. OHLEMEYER: Q. Have you ever done any research  
or  
20 conducted an investigation or published an article about  
the  
21 level of asbestos in the lungs of people who live in North  
22 America?  
23 A. No.  
24 MR. OHLEMEYER: Nothing further, Your Honor. I'd  
move  
25 Defendants' C, D, E, and F into evidence.  
26 THE COURT: Any objection?  
27 MS. CHABER: No objection, Your Honor.  
28 (Defendants' Exhibit C, D, E, and F received in  
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1 evidence.)  
2 THE COURT: Any further questions, Mr. Brake?  
3 MR. BRAKE: No, Your Honor.  
4 THE COURT: Any member of the jury have any  
questions?  
5 Write the question. Do you want to skip it? All right.  
6 Last chance, you know. All right.  
7 Thank you very much, Doctor, you may be excused.  
8 THE WITNESS: Thank you.  
9 THE COURT: Counsel, shall we do the deposition  
10 screening now and take the longer lunch period?  
11 MS. CHABER: We could do that, or I could start my  
12 client.  
13 THE COURT: Which do you want to do? It's your  
14 preference.  
15 MS. CHABER: I think why don't we start.

16 THE COURT: You'd like to start?  
17 MS. CHABER: Yes.  
18 THE COURT: All right.  
19 (Discussion off the record.)  
20 MS. CHABER: At this time, Your Honor, I would call  
to  
21 the stand Dr. Milton J. Horowitz.  
22 THE CLERK: Please come forward and raise your right  
23 hand, sir.  
24 MILTON J. HOROWITZ,  
25 having been called as a witness on behalf of himself, was  
26 duly sworn and testified upon his oath as follows:  
27 THE CLERK: Please state your name and spell your  
name  
28 for the record.  
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1 THE WITNESS: Milton, M-i-l-t-o-n, J, for Joshua,  
2 Horowitz, H-o-r-o-w-i-t-z.  
3 THE CLERK: Thank you, sir. Please be seated.  
4 DIRECT EXAMINATION BY MS. CHABER  
5 MS. CHABER: Q. Dr. Horowitz, have you ever been in  
6 court before?  
7 A. Yes, when I was about 16.  
8 Q. That was awhile ago?  
9 A. Awhile ago.  
10 Q. How old are you now?  
11 A. I am 72.  
12 Q. What's your date of birth?  
13 A. July 24th, 1923.  
14 Q. And where do you live?  
15 A. I live in [DELETED].  
16 Q. What does your family know you by? Do they call you  
17 Milton?  
18 A. My friends and close associates call me Mike.  
19 Q. Are you married?  
20 A. Yes, I am.  
21 Q. And to whom are you married?  
22 A. Shirley Horowitz.  
23 Q. And is that Mrs. Horowitz in the back of the room?  
24 A. Yes, she's in the back of the room.  
25 Q. And how old is Shirley?  
26 A. Shirley is 69.  
27 Q. When were you married to Shirley?  
28 A. On June 22nd, 1947.  
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1 Q. And how old was Shirley when you got married?  
2 A. 21.  
3 Q. And have you been together with her ever since?  
4 A. Yes, I have.  
5 Q. And how many years have you been married?  
6 A. 48.  
7 Q. Do you have any children?  
8 A. Yes, we do. We have four children.  
9 Q. And what are their names and ages?  
10 A. Steven, the oldest, is 46; Sherry, then, is 44; Joy  
is  
11 next, and she's 40; and Peggy is the youngest at 38.  
12 Q. Do you have any grandchildren?  
13 A. Yes, I have eight grandchildren. Do you want their

14 names?  
15 Q. No. I think we will pass on all their names.  
16 Can you give me the age range of them?  
17 A. They range from 2 to 17.  
18 Q. And do you see them with any regularity?  
19 A. We have two sets of grandchildren who live in [DELETED],  
20 which is adjacent to where we live, so we see them  
21 pretty regularly, at least once a week. I have one set of  
22 grandchildren, that is two who live up in [DELETED] , outside  
of  
23 [DELETED]. I see them two or three times a year. And  
then  
24 one grandchild in [DELETED], and I see him, hopefully,  
25 once a year.  
26 Q. And do you have a good relationship with your  
children  
27 and grandchildren?  
28 A. I think so; I think so.  
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1 Q. Can you tell us a little bit about your educational  
2 background?  
3 A. I went through the public schools in New York City,  
4 then graduated from City College of New York in 1943.  
5 Q. Did you graduate with any kind of a degree?  
6 A. Yes, I got what was called there a BS in SS, a  
7 bachelor of science in social science. And then in the  
8 Army -- I was drafted into the Army in 1943. I attended  
the  
9 University of Michigan, the Japanese language school, where  
10 the Army was training me to be a Japanese interpreter.  
Then  
11 I completed their training program and after being  
12 discharged from the service, I entered the graduate school  
13 at the University of Kansas, where I was awarded the Ph.D.  
14 degree in 1952. And also I went through the Meninger  
15 Foundation School of Clinical Psychology, which I  
completed  
16 in June of 1950.  
17 Q. What is the Meninger Foundation?  
18 A. It is a psychiatric and psychological facility that  
19 diagnosis and treats person with mental and emotional  
20 disorders, and they conduct research in the areas of  
mental  
21 health.  
22 Q. Okay. And you do not have an M.D. degree?  
23 A. No, I do not have an M.D. degree, I have a Ph.D.  
24 degree.  
25 Q. And your Ph.D. is in what?  
26 A. It's in clinical psychology.  
27 Q. And when did you receive your Ph.D.?  
28 A. I completed the work for it in January of 1952, but  
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1 the degree was actually awarded in June of '52 at the  
2 graduation exercises at the University of Kansas. They  
have  
3 only one graduation exercise once a year, so even though  
4 some of us completed the program before, we had to wait  
5 until June to get the degree.  
6 Q. Okay. Did you stay in Kansas at that time after you

7 completed your course work?  
8 A. I left Kansas -- we left Kansas in February of '52,  
9 where I accepted a job at the university hospitals of  
10 Cleveland and Case Western Reserve Medical School. It was  
11 a joint position, both in the university hospitals and the  
12 medical school.  
13 Q. And when did you move to California?  
14 A. Moved to California in August of 1964.  
15 Q. Okay. And how long have you lived in California?  
16 A. Well, we lived there for 31 years.  
17 Q. You've stayed there the entire time?  
18 A. Yes, we've been there all the time.  
19 Q. Have you been diagnosed with an asbestos-related  
20 disease?  
21 A. Yes, I've been diagnosed with mesothelioma.  
22 Q. And when were you diagnosed?  
23 A. The diagnosis was made ultimately in August of 1994.  
24 Q. And who was it that told you that what you were  
25 diagnosed with was asbestos-related?  
26 A. Well, as soon as the diagnosis was made, the  
27 physicians who informed me of it and my doctor,  
28 Dr. Rosenbloom, told me that, he asked me, "Where have you  
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1 been exposed to asbestos?" And then I became aware that  
2 this disease was related to asbestos.  
3 Q. At the time that Dr. Rosenbloom told you that, could  
4 you think of where you'd been exposed to asbestos?  
5 A. Oh, I needed to collect my thoughts. I had no clear  
6 ideas as to where I might have been exposed to asbestos. I  
7 then went over my history and thought of the various places  
8 that I had been and began to think about the possibilities.  
9 Q. And did you ever serve in the military?  
10 A. Yes, I did. I was in the military for  
11 three-and-a-half years.  
12 Q. What branch of the service was it?  
13 A. It was called the military intelligence service.  
14 Q. And where did you serve?  
15 A. Well, I was -- I began in upper New York, went to  
16 the University of Michigan a year, went to Fort McClellan,  
17 Alabama, where I took my officer's training, and then Fort  
18 Snelling, Minnesota, and then to Camp Richie, Maryland,  
19 from which I left in October of '45 to go to serve in Japan.  
20 Q. And then how long were you in Japan?  
21 A. I was in Japan for six months, returned in March of  
22 '46.  
23 Q. And what were you doing in Japan?  
24 A. I was a translator reviewing Japanese documents that  
25 the Japanese had secreted, hidden from us during the war,  
26 having to do with various technical and scientific  
27 materials. And we went around, we had language teams that  
28 went around to these facilities and translated them and  
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1 wrote the summaries and sent them back to the Library of  
2 Congress.  
3 Q. And when you came back from Japan, when was that?  
4 A. March of 1946.

5 Q. How did you come back?  
6 A. I came back by troop ship from a 13-day trip from  
7 Yokohama to Seattle.  
8 Q. What was the name of that ship?  
9 A. The ship was named the Marine Falcon.  
10 Q. And what was the condition of the ship?  
11 A. It was a ship that had been in another industry  
12 besides transporting troops, and it was converted into a  
13 troop ship, and the condition was, you know, sort of  
14 rundown, but particularly rundown were the sleeping  
quarters  
15 where the soldiers were sleeping at night.  
16 Q. Did you have any job duties or job functions while  
you  
17 were on board that ship for those 13 days?  
18 A. No, we just were told to relax and do whatever we  
19 wanted, read, or we played cards or listen to the radio,  
20 whatever we could, just to idle the time for 13 days.  
21 Q. Did you spend time in the engine room of the ship?  
22 A. The engine room?  
23 Q. Yes.  
24 A. No, I don't think I was in the engine room. I was  
in  
25 sleeping quarters, which I think were not too far from the  
26 engine room.  
27 Q. But you yourself didn't go down to the engine room?  
28 A. No, no, I wasn't that interested to see what it  
looked

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1 like, no.  
2 Q. Okay. And was that the only time you were ever on a  
3 military-type ship?  
4 A. Yes, I believe so. I can't remember any other.  
5 Q. When you went over to Japan, how did you get there?  
6 A. We flew there from Hamilton Field in California. We  
7 flew to the airport outside of Tokyo. Well, we stopped in  
8 Guam for a couple of days, we did some work there, and then  
9 we went on to Tokyo, but we flew all the way.  
10 Q. And since you've been diagnosed in thinking about  
11 potential sources of asbestos exposure, have any others  
come  
12 to mind?  
13 A. I thought about the work situation that I was in in  
14 Cleveland where I worked in a building that was very close  
15 to a new building that was being erected in the years '54  
to  
16 '56, and I wondered about the possibility of some  
17 contamination from the closeness to the site in which this  
18 work was done.  
19 A five-story building was being built for the new  
20 psychiatric department, and so I thought about that as a  
21 possibility. And then I also thought when I came to  
22 California and worked at the Reiss Davis Child Study  
Center,  
23 I began there in '64, but in '66 and '67, they were  
building  
24 a new wing to accommodate very disturbed children, and I  
25 wondered about the possibility of having been contaminated  
26 in some way by the work that went on in the construction  
27 phase of that facility.  
28 Q. And did --

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1 A. There was one other thing. In 1987, '88, we had some  
2 work done at our house where we lived, our home, and the  
3 removal of asbestos pipes, ducts, which we were concerned  
4 about, because it was that time that there was a lot of  
5 publicity about the ill effects of asbestos piping or  
ducts,

6 and so we had those removed, and I also thought of that as  
a  
7 possibility for some effect.

8 Q. Were you home -- first of all, did you do the removal  
9 work yourself?

10 A. No, no, no, we employed a company that specialized  
in  
11 the removal of this work. Oh, yes, and I'm glad you  
12 mentioned that, because in Cleveland, we lived in this  
13 little house. I wanted to re-do the basement so that the  
14 children could play during the difficult winter period,  
and

15 so I removed the rough surface of the basement and  
replaced

16 it with tiles. And I did that work myself, and that  
lasted  
17 about a week or so.

18 So I wondered about that possibility that I might  
have

19 infected myself through the work that was being done or  
20 through the material that I was handling.

21 Q. As you sit here now, are there any other sources of  
22 asbestos that you believe may have contributed to your  
23 disease?

24 A. Yes, since December, I think it was, when I saw  
25 Dr. Horn, we had a lengthy discussion about the  
26 possibilities of various sources of infection. He took my  
27 smoking history, which was done in great detail, and I  
gave  
28 him the information about what my smoking history was.  
And

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1 then he said to me, did I know that asbestos was in the  
2 filters of cigarettes, the filters that I had been smoking,  
3 and was that a possibility that I had been infected by the  
4 asbestos, so that was the first time I began to think of  
the  
5 asbestos from a cigarette as being a contaminant.

6 Q. When you smoked Kent cigarettes, and we will come  
back

7 to this in detail after the lunch hour, but when you smoked  
8 Kent cigarettes, did you know that there was asbestos in  
the  
9 filter?

10 A. No; oh, no, I did not know that it was asbestos  
11 filters. I just knew that this was what they called the  
12 Micronite filter, and that it was supposed to be good for  
13 our health, and all of that, but I had no knowledge at all  
14 that it was asbestos. I didn't know that until December  
of  
15 1994.

16 Q. Now, Dr. Horowitz, after the service when you got

out,

17 what year was that that you got out?

18 A. '46; October of '46.

19 Q. What did you do when you got out of the service?

20 A. I made preparation to enter the Meninger School of  
21 Clinical Psychology. I had interviews, and so forth, and  
22 tests, and then was accepted, and began it in February of  
23 '47.

24 Q. And what were your goals at that time?

25 A. My goals were to become a psychologist and to do

what

26 I could do in relation to the work that psychologists did.

27 Q. Okay. And you were in school from '47 to '52?

28 A. '52, yes.

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1 Q. Did anything -- how did you get to Cleveland? How  
did

2 that come about?

3 A. The director of the department of psychiatry in  
4 Cleveland wrote to the director of my facility in Topeka,  
5 where I was being trained, and asked if they had any bright  
6 young men or women who would fit the bill to take a  
7 challenging job in Cleveland, and so the director of our  
8 program recommended me. And I was interviewed, then, in  
9 October of '51 and was given the job, and which I began in  
10 February of '52.

11 Q. And you moved there in February of '52 to Cleveland?

12 A. I moved to Cleveland; however, I went to New York  
13 first to leave my wife and two children at that time in

New

14 York, because we had no place to live in Cleveland.

15 Q. And why in New York?

16 A. Well, our families lived there, and Shirley's mother  
17 was able to accommodate her and the children during that  
18 time.

19 Q. At that time, how many children?

20 A. We had two children at that time. And so we needed  
a  
21 place to live.

22 Meanwhile, I took a room in Cleveland to get started  
23 on the job, and also to start looking for housing. And  
24 finally, when I found a house, I called Shirley up, and we  
25 spent a weekend together and we accepted that house, or we  
26 offered and our offer was accepted for that house, and we

--

27 she moved in sometime in March or April. I'm not sure

when

28 she moved there. Meanwhile, I had to live by myself in

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1 Cleveland for that month or so.

2 Q. And when you took the job in Cleveland, what was that  
3 job that you were taking?

4 A. It was a dual appointment. I was an instructor in  
5 psychology at the medical school and also a psychologist,  
6 senior instructor in psychology at the university hospitals  
7 of Cleveland. And my job, basically, was to work in  
8 diagnosis of patients who came to the hospital and also to  
9 help in the treatment programs that were going on.

10 Q. And how long did you remain at the university



11 hospitals in Cleveland?  
12 A. I remained there until '64, when we moved to  
13 California, with the exception of one year, 1961 to '62,  
14 when I was on sabbatical at the University of California  
at  
15 Berkeley. I had a year provided for me by the  
Commonwealth  
16 Fund in New York. They paid my way, and I spent a year at  
17 Berkeley doing research on higher education.  
18 Q. What were you doing?  
19 A. I was writing an article for the Journal of Medical  
20 Education at that time, and I was interested in graduate  
and  
21 professional education. I found a place in Berkeley where  
I  
22 could also participate with them in their studies on  
higher  
23 education, so I traveled with the team of investigators  
24 around the country to different college settings where  
25 research was going on in higher education.  
26 I found that interesting. And simultaneously, I  
wrote  
27 about higher education, nonmedical professional education  
28 for the Journal of Medical Education, so it was an  
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1 interesting time.  
2 Q. And when the sabbatical was over in 1962?  
3 A. I went back to Cleveland, yes.  
4 Q. And then from there, the following year you went to  
5 California?  
6 A. I went to -- yes, we began -- the director of the  
7 child study program, Reiss Davis Child Study Center had  
8 heard about my interest in education and work with  
children,  
9 and so forth, and asked me if I'd be interested as a job  
10 there in director of professional education. And after  
11 having spent a year in California, I realized that I much  
12 preferred to live there than to live in Cleveland. It was  
13 pretty dark and difficult in the winter months.  
14 Q. So you didn't like the winters in Cleveland?  
15 A. No.  
16 Q. And you moved to California?  
17 A. Moved to California.  
18 Q. Okay. And the job at the Reiss Davis Child Study  
19 Center, what was your title?  
20 A. I was the director of professional education, but it  
21 was also a place in which I could see my career developing  
22 in the area of working with children. I was very  
interested  
23 in working with this sort of children. I had some  
24 experience with children, I had done my doctoral studies  
on  
25 children, but this place specialized in treating psychotic  
26 children, or very disturbed children, so I took on some of  
27 these kids and got good supervision with them, and I  
thought  
28 it was a good tradeoff.

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1 I did the professional education work, but I also was

2 extending my own career in that area. And I began also to  
3 do some private work, because the salary in places like  
that  
4 isn't very great, so I needed to supplement my income, so I  
5 was a very busy guy beginning in 1964.

6 Q. And how long did you remain at Reiss Davis?

7 A. Until '69. I stayed there for five years, and then  
8 branched off into full time private work, although I  
9 continued my connection with Reiss Davis, but I also began  
10 another very important step in my life, and having to do  
11 with entering or beginning a connection with a  
12 psychoanalytic institute.

13 Q. What's that?

14 A. That's the Los Angeles Institute for Psychoanalytic  
15 Studies, which is a facility that trains people to become  
16 psychoanalysts. I was very interested in that, and began  
to  
17 associate with these people, to do research with them, to  
18 teach with them and to write with them. And so I then  
began

19 my career in private work, and also working -- this became  
20 my major academic type of setting that I worked at.

21 Q. Was that the institute?

22 A. At this institute, yes.

23 Q. And have you remained active with the institute?

24 A. Oh, very much so. I've been the head of committees,  
25 I've been the president, I've been the dean of the  
26 institute, a lot of things over these last 23 years or  
27 something, 24 years.

28 Q. Before you were diagnosed with the mesothelioma, did  
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1 you do any training of people studying to be  
psychoanalysts?

2 A. Oh, yes, I am a psychoanalyst, and I have -- I had  
3 people in analysis who were training to be psychoanalysts.  
4 I also did supervision of people who were treating other  
5 people, but needed supervision while they were working. So  
6 both as a supervisor and as an analyst and a teacher,  
7 because I taught courses every year. We were required to  
8 teach at least one or two courses, so that was my principal  
9 academic activity during this period.

10 Q. And before you were diagnosed with the mesothelioma,  
11 how frequently were you working in your private practice?

12 A. Oh, I worked in my private practice every day. I  
was,  
13 in the years -- I was averaging around 30, 35 hours of  
work

14 a week, and then on top of that, I did supervision and  
15 analysis, so, you know, it was a busy time.

16 MS. CHABER: Your Honor, this might be a good time.  
17 Are we taking a lunch break?

18 THE COURT: All right. That's a good idea. I was  
19 fascinated with his stories, so got lost in the time.

20 We will take the noon recess at this time, ladies  
and

21 gentlemen, until 1:30. Please keep in mind the  
admonitions

22 given to you before, that you are not to form an opinion  
23 about the case, you are not to make any inquiry about it,  
24 you are not to talk about it amongst yourselves or with  
25 anyone else. If anyone attempts to talk to you about it,

26 please advise the Court of that fact. Return at 1:30,  
27 please.  
28 (In open court outside the presence of the  
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1 jury.)

2 THE COURT: I have a love note from one of the  
jurors.

3 This is what it asks: Why is this case conducted in San  
4 Francisco when the plaintiff lives in [DELETED] and the  
5 defendants are from the Midwest and the East Coast?

6 MR. OHLEMEYER: Does California have statewide venue.

7 MS. CHABER: Yes, we have statewide venue.

8 MR. BRAKE: But the venue is a function of --

9 MS. CHABER: There was no motion for change of venue.  
10 California has statewide venue.

11 MR. BRAKE: Without regard to other venues proper,  
the

12 reason this case is here was at the time it was filed was  
13 there were other defendants whose principal places of  
14 business or whose connection to San Francisco was  
15 sufficient. If she filed a case against us alone, it  
16 wouldn't be.

17 MS. CHABER: I understand, but that's a legal issue  
18 that is not of consequence to the jury, nor should the  
jury

19 opine on those questions as to whether you being the only  
20 defendants in here, we would have been somewhere else.  
21 That's not where we are now, and it's perfectly proper  
that

22 we are here. This was a proper place to file.

23 THE COURT: That's a good question, and I think we  
24 will have to give them a vague and uncertain answer and  
tell

25 them not to worry about it, it doesn't make any  
difference.

26 There's several different places that could have brought  
the

27 case and it was brought here and here we are. That's all  
28 that matters. Is Mrs. Horowitz going to testify?

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1 MS. CHABER: Yes, she is, though I don't know if  
2 that's going to be today. It depends.

3 THE COURT: Then we are going to reserve for some  
4 other time to screen these depositions. They are not going  
5 to be given today or tomorrow; is that right? They are not  
6 going to be read to the jury?

7 MR. OHLEMEYER: Not today.

8 MS. CHABER: Well, I didn't anticipate reading them  
9 today. I was hoping we could get through them at some  
point

10 today and be read.

11 THE COURT: I don't know how much longer they will  
12 take, but I'm trying to figure it out, because if we are  
13 going to take them today, then we probably are going to  
have  
14 to terminate testimony early.

15 MS. CHABER: I don't want to do that, either. I  
16 prefer to do the live witnesses when the live witnesses  
are

17 available.  
18 THE COURT: We will do that some other time.  
19 MS. CHABER: And we will fill in the depositions at  
20 another point.  
21 (Lunch recess taken.)  
22 (In open court in the presence of the jury.)  
23 THE COURT: Good afternoon, everybody. All of the  
24 jurors and counsel and witnesses are present, so we may  
25 proceed, please. Ms. Chaber.  
26 MS. CHABER: All right.  
27 Q. Dr. Horowitz, have you ever been a smoker?  
28 A. Oh, yes.  
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1 Q. When did you begin smoking?  
2 A. I began smoking in the military service in 1944.  
3 Q. How did you start?  
4 A. The various cigarette companies distributed samples  
of  
5 cigarettes to the soldiers, and so I got my first pack of  
6 cigarettes from Old Gold cigarettes.  
7 Q. And how much did you smoke when you first started?  
8 A. Relatively mild. About a half a pack a day, and then  
9 I gradually increased to about a pack or less a day. I  
10 never really went over a pack a day.  
11 Q. And when you began, you said you started out with  
Old  
12 Golds?  
13 A. Yes.  
14 Q. Were those filter or nonfilter cigarettes?  
15 A. They were nonfilter.  
16 Q. And did you only smoke Old Golds?  
17 A. During that period in the military, I tried  
different  
18 kinds. We had Lucky Strikes, we had Chesterfields, we had  
19 three kinds, basically, but during the military I smoked  
20 mostly Old Golds and Chesterfields.  
21 Q. And when then -- were any of those filtered  
22 cigarettes?  
23 A. No, they were not filtered.  
24 Q. When you got out of the military, what did you smoke  
25 then?  
26 A. I smoked Chesterfields beginning in 1946 when I got  
27 out of the military. I stayed with Chesterfields until I  
28 switched to Kent filters in 1952.  
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1 Q. And besides Kent filters, did you ever smoke any  
other  
2 filter cigarette?  
3 A. I tried once with a friend to smoke a Marlboro  
filter.  
4 I once smoked a Kool, but that was about all. I stayed  
with  
5 Kent.  
6 Q. And when did you begin smoking Kent cigarettes?  
7 A. Very clearly in the spring of 1952. I remember that  
8 clearly, because 1952 was a very important time in my life,  
9 as I mentioned earlier. I had completed my studies in  
10 Kansas, I moved to Cleveland for my first real job. We  
11 moved our family, and I settled into a job, and with new

12 friends and new setting, and also began smoking a new  
13 cigarette.  
14 Q. And why did you start to smoke Kents?  
15 A. Well, at the time, I think Kent was introduced  
16 somewhere in February or March of 1952, the Kent filters,  
17 and it was accompanied by great advertising that suggested  
18 that it was safe, it was good for one's health, it was  
more  
19 successful than other cigarettes in filtering out tars and  
20 nicotines, and also the friends that I had made, one of  
the  
21 doctors at the university hospital, they also seemed to be  
22 convinced that Kents were the cigarette to smoke, so I  
went  
23 along with that.  
24 Q. What do you recall about the advertising for Kent?  
25 A. I saw lots of advertising in different publications.  
26 They were both in medical journals and in the regular  
press,  
27 like Look magazine, Life magazine, Saturday Evening Post,  
28 and then The Journal of the American Medical Association.  
I

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1 think even The New England Journal of Medicine had ads,  
very  
2 favorable ads for Kents.  
3 Q. What did seeing an ad in a medical journal do for you  
4 with respect to your thoughts about the cigarette?  
5 A. It just added to what I had heard informally about  
the  
6 safety and health saving aspects of that filter, and so I  
7 felt encouraged to go on with that.  
8 Q. What do you recall about the representations made  
9 about Kent in their advertising?  
10 A. That they filtered -- particularly the filters, you  
11 see, that the filters filtered out unhealthy aspects of  
the  
12 smoke; that they reduced tars and nicotines; that they  
were  
13 the most effective, healthful cigarette that was available  
14 at that time.  
15 Q. And what do you recall about the filter at the time  
16 that you first started smoking Kents?  
17 A. I recall mostly about that filter, the color of it.  
18 It was a very emotional thing in some strange way because  
my  
19 father had died four months prior to that, and my father  
had  
20 beautiful blue eyes, and the filter of Kents was exactly  
the  
21 same color as my father's eyes, and that stuck with me so  
22 strongly, that I never was able to forget that.  
23 MS. CHABER: May I confer with counsel for a moment,  
24 Your Honor?  
25 THE COURT: Certainly.  
26 (Discussion off the record.)  
27 MS. CHABER: Your Honor, I have a series of  
28 photographs I'd like to have marked as Plaintiffs' next in  
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1 order.  
2 THE CLERK: Plaintiffs' Exhibits 30 through 36 marked  
3 for identification.  
4 (Plaintiffs' Exhibits 30 through 36 marked for  
5 identification.)  
6 MS. CHABER: Q. Dr. Horowitz, I'm handing you  
7 Plaintiffs' Exhibit 32 and ask you if you recognize that  
8 photograph.  
9 A. Yes, this looks exactly like a package of Kents with  
10 that blue Micronite filter that I began to know in 1952.  
11 Q. And handing you Exhibit 30, can you tell us what  
that  
12 looks like?  
13 A. That also looks like the same thing. That's looking  
14 down on the blue filter tip cigarettes of Kents in 1952.  
It  
15 had a distinctly porous appearance. It was not smooth  
like  
16 some of the current filters are. There were like holes,  
17 pock marks in between.  
18 MS. CHABER: I'd like to display them to the jury.  
19 THE COURT: All right.  
20 MR. OHLEMEYER: Are they being offered, Your Honor?  
21 THE COURT: No. I don't know. They haven't been  
22 offered yet.  
23 MR. OHLEMEYER: Are you going to offer them into  
24 evidence?  
25 MS. CHABER: I will, subject to the discussion that  
26 you and I just had off the record, which I thought we were  
27 going to work out subsequent to this.  
28 MR. OHLEMEYER: It's a procedural point, Your Honor.  
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1 If she offers them into evidence, I have no objection.  
2 MS. CHABER: I would offer them into evidence, and  
I'm  
3 seeking to have color xeroxes substituted for them at a  
4 later point in time.  
5 THE COURT: That's fine. All right. They may be  
6 admitted.  
7 (Plaintiffs' Exhibits 30 & 32 received in evidence.)  
8 MS. CHABER: Q. Dr. Horowitz, at the time you met  
9 with Dr. Horn and discussed your smoking history with him  
--  
10 do you recall that time?  
11 A. Yes, I remember that.  
12 Q. Had you seen these photographs at that time?  
13 A. No, I had not seen these photographs.  
14 Q. And at the time of your deposition in April when you  
15 were asked questions about your smoking history, had you  
16 seen those photographs at that time?  
17 A. No, I had not seen them in April.  
18 Q. I'm handing you Plaintiffs' Exhibit 33. Can you  
tell  
19 us what that is?  
20 A. This is a picture of what the Kent filtered  
cigarette  
21 looked like, package looked like when it first came out.  
22 This was replaced a couple years later by a king size  
23 package, but this was the regular package of Kent  
24 cigarettes.  
25 Q. Did you smoke the regular cigarettes?

26 A. Well, the filtered cigarettes.  
27 Q. They were filters?  
28 A. Yes, this is what we are talking about, filters,  
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1 because I never smoked Kent -- I don't know if Kent had any  
2 nonfiltered cigarettes. I don't know that.  
3 Q. You didn't smoke them?  
4 A. No, no, in no case did I ever smoke a nonfilter from  
5 Kent, right.  
6 Q. When you first started to smoke Kents in 1952, what  
7 package did you smoke from? What was the type, was it a  
8 king size?  
9 A. No, it was not king size, it was regular size, such  
as  
10 this represents. This is a photograph of a regular size  
11 filter tip cigarette package.  
12 Q. And is that what you started out smoking?  
13 A. Yes, I started out smoking that.  
14 Q. And I'm handing you Plaintiffs' 34. Can you tell us  
15 what is that is?  
16 A. That's -- that's the back of the package of Kent  
17 cigarettes, and it has on it what I said before concerning  
18 the advertising claims of the Kent manufacturer.  
19 Q. Handing you Plaintiffs' Exhibit 35, ask you if you  
20 recognize that?  
21 A. Yes, I recognize that. This now is a picture of a  
22 king size package of filter cigarettes by Kent.  
23 Q. Did you ever smoke the king size?  
24 A. Oh, yes, I did. When they went into king size in  
25 1954, I believe, I continued with them, except that I used  
26 the king size then.  
27 Q. And handing you Plaintiffs' 36, do you recognize  
that?  
28 A. Yes, I recognize that.  
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1 Q. And what is that?  
2 A. That's a picture of a Kent cigarette with a Micronite  
3 filter.  
4 MS. CHABER: May I show these to the jury, Your  
Honor?  
5 THE COURT: Yes. You're offering them?  
6 MS. CHABER: Yes.  
7 MR. OHLEMEYER: No objection, Your Honor, with the  
8 same proviso.  
9 THE COURT: Yes.  
10 (Plaintiffs' Exhibits 31, 33, 34, 35, & 36 received  
in  
11 evidence.)  
12 MS. CHABER: Q. Dr. Horowitz, when you went to see  
13 Dr. Horn, was that at my office's request?  
14 A. Yes.  
15 Q. How long did Dr. Horn spend with you?  
16 A. Between two and three hours.  
17 Q. What kinds of things did he do?  
18 A. Well, he first had me fill out a lengthy  
questionnaire  
19 about my medical history. Then he went into my medical  
20 history in great detail. And while he was asking me  
21 questions, he was also dictating the answers as he was

going

22 forth and making his record of what we were talking about.  
23 He also then asked me in detail about my smoking history,  
24 something that no other doctor had previously done.

25 And then he examined me -- but before that, I should  
26 say one of his technical assistants gave me a series of  
lung

27 tests to see what my abilities were, in terms of breathing  
28 in and blowing out and holding air and all of that. That

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1 took almost an hour, too. So that should increase the  
time.

2 I was there about four hours altogether.

3 Q. Did you have x-rays done, as well?

4 A. Yes, I'm sorry, I forgot that. Yes, we had chest  
5 x-rays taken as well, right.

6 Q. In the form that you filled out, I think defense has  
7 already marked that as Defense F, I believe. Is this the  
8 form?

9 A. Yes, that looks familiar.

10 Q. Were there questions asked about smoking on that?

11 A. On this form?

12 Q. Yes.

13 A. Yes, there are questions about that.

14 Q. And what questions were asked about smoking?

15 A. Well, do I smoke or did I smoke cigarettes.

16 Q. What was your answer?

17 A. Yes. Question: Did I smoke cigars or pipe? My  
18 answer was no. Do I presently smoke? The answer was no.  
19 How many packs per day? I left that blank. At what age  
did

20 you start smoking? 1944.

21 Q. Does it say what age?

22 A. At what age or year did you start smoking, yes. At  
23 what age or year did you quit smoking? I wrote 1963.

24 Q. When did you quit smoking?

25 A. New Years' weekend 1963.

26 Q. And how did it come about that you quit smoking?

27 A. Well, it began when I was in Berkeley in the year  
of.

28 '61 to '62 when there was an awful lot of talk about the  
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1 hazards of smoking, but it was not really until I began to  
2 feel some of the unpleasant side effects of smoking, like  
3 I'd feel congested or like I had to clear my throat when I  
4 woke up in the morning. And I began to take this all  
5 seriously. And New Years' weekend '63, I decided I was  
6 going to stop and that was it.

7 Q. How easy was it to quit smoking?

8 A. It wasn't so easy. I went through the usual problem  
9 of what to do instead of smoking. I tried life savers, I  
10 tried gum, I tried drinking water, I tried doing exercise.  
11 It took about three or four months before I got on top of  
12 it.

13 Q. And in the course of your work as a psychologist,  
you

14 have occasion to deal with people who have addictions?

15 A. Yes.

16 MR. OHLEMEYER: Objection, Your Honor, relevance.



17 THE COURT: Sustained.  
18 MS. CHABER: Q. Knowing what you know about  
19 psychology, do you have an opinion as to whether or not  
you  
20 were addicted to smoking?  
21 MR. OHLEMEYER: Same objection.  
22 THE COURT: Sustained.  
23 MS. CHABER: Q. When you first started smoking the  
24 Kent cigarettes in 1952 -- strike that. Let me ask you  
some  
25 other questions.  
26 When you finished smoking a cigarette, did you do  
27 anything to it besides putting it out?  
28 A. Back in the days when I was in the Army, they taught  
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1 us to strip a cigarette. That is, to take the paper off  
the  
2 tip of the cigarette so that the tobacco would come out.  
3 This was intended to prevent fires. That is, butts of  
4 cigarettes to start fires, so that this habit persisted  
with  
5 me for some time.  
6 And occasionally when I finished a filter tip, I got  
7 to be very interested in the feel of that filter, and I  
8 stripped it down and sort of played with this porous blue  
9 filter for a bit before I discarded it.  
10 Q. And was that something that you were doing  
11 intentionally to find out what was in the filter?  
12 MR. OHLEMEYER: Objection, Your Honor, leading.  
13 THE COURT: Restate the question.  
14 MS. CHABER: Q. Were you doing that intentionally,  
or  
15 were you doing that in some other unconscious way?  
16 MR. OHLEMEYER: Same objection.  
17 THE COURT: Don't suggest the answer. Just ask him  
18 why.  
19 MS. CHABER: Q. Why did you do that?  
20 A. Well, partly out of habit. It was unconscious. But  
I  
21 was also very curious to study the filter itself, I mean  
22 what it looked like, what it felt like. It was different.  
23 Q. Did you know what it was made out of?  
24 A. No. It felt somewhere between paper and cotton. It  
25 had a nice soft feel to it, but the feel was not  
consistent.  
26 There were parts of it that were rougher than others. And  
27 not always were the cigarettes the same in feel. That  
made  
28 me feel very curious about them.  
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1 Q. Did you go and do any kind of scientific analysis of  
2 what was in them?  
3 A. No, I didn't do that, no.  
4 Q. Did you ever read any articles about Kent filter  
5 cigarettes or any other filter cigarettes?  
6 A. No, I did not. That is not only very recently. But  
7 in all the years that I was smoking, I did not.  
8 Q. And when you met with Dr. Horn and gave him your  
9 smoking history, did Dr. Horn suggest any answers to you?

10 A. Well, Dr. Horn made it very clear that the filter of  
11 the Kent cigarette, the years that I was smoking it,  
12 contained asbestos, and that in his opinion, there was a  
13 relationship between that smoking or that asbestos and  
14 mesothelioma, with which I was diagnosed.

15 Q. At what point in time did Dr. Horn make that clear  
to  
16 you, before or after you gave a smoking history?

17 A. It was after. It was after. Because I had given  
much  
18 of that here and I talked to him about it, and then he  
asked

19 me what did I know about Kent cigarettes, and I told him I  
20 knew nothing, except I described to him what those filters  
21 looked like, et cetera, and then he brought up the  
22 connection between the asbestos and mesothelioma.

23 Q. When you were giving the smoking history and that  
24 information, did Dr. Horn suggest anything to you about  
25 years that you might have smoked those cigarettes?

26 A. The years?

27 Q. Yes, when you were giving him the smoking history  
and  
28 he was asking you questions about your smoking, did Dr.  
Horn

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1 make any suggestions to you about what years you had smoked  
2 cigarettes?

3 A. No, he did not make any suggestion to me. I was the  
4 one who told him when I smoked them, and I was the one who  
5 told him what the filter looked like as part of his getting  
6 the history from me. I told him about this blue filter, I  
7 remember that it was a blue Micronite filter, and I told  
him

8 about my experiences with it. He did not suggest any of  
9 that to me. The link was that he told me that it contained  
10 asbestos, which I did not know.

11 Q. And that was after you'd given him this history?

12 A. Yes, I spontaneously and voluntarily gave him the  
13 other information, and then he added the part about the  
14 asbestos.

15 Q. And was that something you had known before you had  
16 gone to see Dr. Horn?

17 A. No, I did not know that. I did not know that.

18 Q. Now, you had gone to see Dr. Horn because you had  
19 filed a lawsuit for asbestos; correct?

20 A. That is correct.

21 Q. And at the time that you went to see Dr. Horn, were  
22 these defendants, Lorillard and Hollingsworth and Vose,  
part

23 of that lawsuit?

24 A. No, not when I went to see Dr. Horn. They were  
added  
25 afterwards.

26 Q. Now, the filter that you described to Dr. Horn and  
27 that we've just looked at the picture of, did that filter  
28 change?

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1 A. Change over time?

2 Q. Did it ever change?

3 A. Oh, yes, it changed. It changed somewhere in 1956 or  
4 '57. I approximated about four or five years of my using  
5 it, it became white. It no longer was a blue filter. It  
6 began to be called a Micronite filter, the same name, but a  
7 different type of filter, not blue anymore.

8 Q. Do you recall whether or not it still had, even  
though  
9 the color had changed, whether it had the same appearance  
as  
10 shown in Plaintiffs' 31?

11 A. Well, you know, I can't answer that clearly. The  
12 color of it having turned white afterwards, when I looked  
at  
13 the filter in opening a pack, I could not see very  
clearly,

14 and I was not as aware of the differences in the way the  
15 filter looked, just I was aware of the difference, clear  
16 differences in the color.

17 Q. Was there any change at all in the porousness of the  
18 filter?

19 A. I don't recall that. I don't recall that.

20 Q. When you lived in Cleveland during the time period  
21 that you were smoking Kent filter cigarettes, did you  
22 participate in a poker game?

23 A. Yes, I did. I played poker about once every couple  
of  
24 weeks.

25 Q. And are any of the people that you played poker with  
26 still an alive?

27 A. There are two that I know who are still alive, yes.

28 Q. And who are they?

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1 A. Dr. Elliott Foxman is one and Mr. Fred Schleffler is  
2 another.

3 Q. And how do you know Dr. Foxman?

4 A. I knew Dr. Foxman first in my days in Topeka. He's a  
5 psychiatrist. He was in training to be a psychiatrist.  
6 Then he left -- no, I left Topeka in February of 1952. He  
7 then went into the service later in 1952, and low and  
8 behold, and sometime late '54 he reappears out of the  
9 service in Cleveland, and I got to know that, because his  
10 wife met my wife at someplace, and we reestablished our  
11 friendship. And we've been friends of since.

12 Q. And what year was that that you reestablished your  
13 friendship?

14 A. It was probably in early '55 or -- well, maybe late  
15 '54.

16 Q. And you remained friends?

17 A. Oh, yes, we've remained friends ever since.

18 Q. And did he -- you moved to California in 19 --

19 A. I moved to California in '64.

20 Q. Did Dr. Foxman remain in Cleveland?

21 A. No, he preceded us in moving to California. He was  
in  
22 Los Angeles before we got there.

23 Q. And then did you meet up with him again in Los  
24 Angeles?

25 A. Yes, we met up again in Los Angeles, right.

26 Q. And how is Dr. Foxman's health at present?

27 MR. OHLEMEYER: Objection, Your Honor, relevance.

28 THE COURT: Sustained.

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1 MS. CHABER: It's foundational, Your Honor, to  
2 unavailability.

3 THE COURT: All right.

4 MR. OHLEMEYER: Your Honor, that's not a matter --

5 MR. BRAKE: Not for the jury in any event.

6 THE COURT: It's not relevant.

7 MS. CHABER: Q. Had you asked Dr. Foxman to come up  
8 here to testify?

9 MR. OHLEMEYER: Objection, Your Honor, relevance.

10 THE COURT: Sustained. We can take that up outside  
11 the presence of the jury if there's a problem about it.

12 MS. CHABER: Okay. Did Dr. Foxman smoke?

13 A. Yes, he smoked.

14 Q. He was in this poker game with you in Cleveland?

15 A. Yes, he was with me when he came back to -- when we  
16 met again in Cleveland in '54, '55.

17 Q. And were the poker games ever at your house?

18 A. Oh, yes, they were at my house most of the time.

19 Q. And when the poker games were at your house, who  
20 provided the cigarettes?

21 A. Well, I would have a pack of Kents around, and he  
22 would smoke them, or the others occasionally would smoke  
23 some, too.

24 Q. Did Dr. Foxman always bring his own cigarettes to  
the  
25 game?

26 MR. OHLEMEYER: Objection, Your Honor, relevance.

27 THE COURT: I don't see the relevance.

28 MS. CHABER: It's foundational to offers from  
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1 Dr. Foxman, Your Honor.

2 THE COURT: Okay, well, do that with Foxman.

3 MS. CHABER: I can't do that with Foxman. That's the  
4 problem.

5 MR. BRAKE: Can we go to sidebar, maybe, and sort  
this  
6 out?

7 THE COURT: Go ahead and ask the witness questions.  
8 We are not talking about Foxman here and now.

9 MS. CHABER: Q. Did Dr. Foxman ever borrow or bum  
10 cigarettes from you?

11 A. Yes, he did.

12 Q. And what were the only cigarettes that you smoked  
from

13 the time that you re-met Dr. Foxman in 1954 --

14 A. Well, Kents were the only cigarettes that I ever  
15 smoked, really, in that period.

16 Q. Did what your friends were smoking, was that  
something

17 you paid attention to?

18 A. Sometimes.

19 MR. BRAKE: Leading.

20 THE WITNESS: I was aware that they smoked different  
21 cigarettes, but that wasn't a big issue.

22 MS. CHABER: Q. Who bought the cigarettes in your  
23 house?

24 A. Generally my wife did when she went shopping.

25 Q. Did Shirley smoke?

26 A. Yes, she smoked Kents, too.  
27 Q. And do you know what the price of a pack of Kent  
28 cigarettes was in 1954?

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1 A. I never paid attention to it. I don't know. I don't  
2 know whether they were cheaper or dearer than other  
3 cigarettes. I don't know.

4 Q. Were there any television shows that you watched in  
5 the 1950s?

6 A. A lot of them. Mostly through the kinds of shows our  
7 kids liked to watch, but I watched them, too.

8 Q. And I don't want to ask a leading question, Your  
9 Honor, but we could be here for a while.

10 Can you name some of the shows that you watched in  
the

11 1950s?

12 A. Oh, Father Knows Best, Milton Berle, \$64,000  
question,

13 Roy Rogers, Mickey Mouse.

14 Q. Some of your kids were young?

15 A. Yes.

16 Q. At the time that you read them, can you tell us  
17 whether or not you believe the ads that Kents were safer  
18 than other cigarettes?

19 A. I believed it. I believed what it said on the  
20 package.

21 Q. At the time that you were smoking Kent cigarettes  
with

22 the blue filter, did you know that asbestos was hazardous  
to  
23 health?

24 A. I did not know hazardous -- asbestos was hazardous  
to  
25 health, and I certainly didn't know that it was contained  
in  
26 the cigarette filter.

27 Q. When did you first learn of the hazards of asbestos?

28 A. In about 1985, when I began to read about people  
being

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1 concerned about asbestos pipes in their homes and needing  
to  
2 remove them, and people coming down with illnesses  
3 associated with asbestos.

4 Q. In the 1950s, do you recall what magazines you were  
5 reading, either at home or at work?

6 A. Well, there were the popular magazines like Look and  
7 Life, and sometimes we read the Saturday Evening Post.

Then

8 I read a lot of professional journals. I think Time, also,  
9 was out at that time. Yeah, I think.

10 Q. Now, besides asbestos from Kent filter cigarettes,  
you

11 told us that there were some other ways that you think you  
12 might have been exposed. I want to talk to you about

Hanna

13 Pavillion.

14 A. Yes.

15 Q. Now, where was Hanna Pavillion located?

16 A. It was located in a section of Cleveland which was  
17 part of the university hospitals group. It was built in  
the  
18 years 1954 to '56, and it was located about 100 feet or so  
19 away from the office that I occupied in those years.  
20 Q. And what kind of work was being done at that  
21 pavillion?  
22 A. Construction work. They dug a hole in the ground,  
23 they started to build a building. They began the building  
24 from the ground on up, and it was a five-story building,  
25 included a very extensive laboratory for animals in the  
26 basement where experiments were done. We had inpatient  
27 hospital facilities, we had outpatient clinics, we had  
28 offices. It was a major structure.

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1 Q. And did you, besides having your office located  
2 nearby, did you ever go on the construction site itself?  
3 A. Oh, yes, while the building was being built, the  
4 director of our department was a man named Douglas Barne,  
5 who was very proud of having gotten the funds for the  
6 building of this building and what it would mean to the  
7 growth of psychiatry in the area, and he encouraged us to  
8 share that pride by periodic visits to see how this  
building  
9 was going on as it was being developed.  
10 Q. And at the time that you went on, were there workers  
11 that were doing construction work?  
12 A. Yes, there were people working. I began by  
observing  
13 the workers putting up the steel girders and spraying the  
14 steel girders with various materials. Then, as the  
building  
15 began to shape up, we began to make visits to it to see  
what  
16 it was like. And except for being warned every so often  
not  
17 to get too close to the workers themselves, we were not  
kept  
18 from visiting.  
19 Q. Do you know what materials or what was contained  
20 within the materials that these workers were working with?  
21 A. I don't know exactly. I saw all kinds of bags and  
22 boxes and things and being blown into the building and  
blown  
23 on the girders, but I never really paid attention to what  
24 the content was of the material.  
25 Q. And you also said that you were around a  
construction  
26 site at Reiss Davis?  
27 A. Yes, but not as much as I was at the Hanna  
Pavillion,  
28 because at Reiss Davis the wing that was being put on was  
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1 sort of around the back to where my office was located, so  
2 my greatest exposure to that was when I would go to the  
3 parking lot to -- before or after work, and I would be  
close  
4 to what they were doing.  
5 Q. Do you know what any of the materials that were being

6 used there were?  
7 A. The usual, you know, building materials, steel and  
8 stone and cement and aluminum and plaster and all kinds of  
9 things. I suppose there was also a lot of asbestos being  
10 blown in and put on and so forth.  
11 Q. Do you know that?  
12 A. I know that from having talked to the director of  
the  
13 building and his knowledge of all the people who worked  
14 there, yes. I talked to him after it was all done and he  
15 knew exactly what was being done.  
16 Q. Now, Dr. Horowitz, let me ask you if you'd ever been  
17 diagnosed with cancer before you were diagnosed with  
18 mesothelioma?  
19 A. Yes, I had been diagnosed with cancer two other  
times  
20 in my life. When I was 47, I had cancer of the bowel,  
which  
21 was removed surgically.  
22 Q. And what year was that?  
23 A. That was in 1971. April. And the results were  
good,  
24 I never had any sequelae, and I've had periodic  
25 colonoscopies done to see if any polyps were developing  
and  
26 if any polyps were, they were removed, and I've never had  
27 any trouble with my bowels since 1971.  
28 Q. Have you had any recurrence of the colon cancer  
since

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1 the surgery?  
2 A. No, no recurrences. Then in 1987, I had a  
3 prostatectomy, which was a surgical removal of my prostate,  
4 which was cancerous.  
5 Q. And what were you told you had?  
6 A. I was told I had adenocarcinoma of the prostate.  
7 Q. Was there any question at that time as to whether or  
8 not it had metastasized or spread to any other places?  
9 A. At the time of the surgery, the surgeon removed 14  
10 lymph nodes, which ran up and down my abdominal area, and  
11 after the surgery was completed, one of these lymph nodes  
12 showed microscopic metastasis. It was found through  
13 microscopic examination of the tissue. That's how we knew  
14 that there was one and that was metastasized.  
15 Q. And what were you advised to do from that point on?  
16 A. Well, I was advised to sit tight and see what  
17 developed. I took regular PSA tests, which were zero, and  
18 then three years later, there began to be an elevation of  
19 the PSA.  
20 Q. Which is what?  
21 A. It's the prostate specific antigen, PSA, which  
22 represents the amount of prostate that's liberated through  
23 the activity of testosterone in the system. And at the  
time  
24 that it read 13, my urologist, who had taken care of me at  
25 that time, suggested that we consider hormone therapy,  
26 consider it. I decided, in consultation with my  
internist,  
27 that at this stage of the game it would be better if I  
were  
28 under the care of an oncologist rather than a surgeon.

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1 Q. And why did you decide that?

2 A. Because they thought that this was now a systemic  
3 disease, it was not a disease that required surgical  
4 intervention, it was something that would require care and  
5 thoughtfulness from someone who was a cancer expert rather  
6 than someone who was a surgeon.

7 So I did that, and went to Dr. Barry Rosenbloom in  
8 late 1990, which was over three years after my original  
9 surgery. And after various examinations, consultations, we  
10 decided to let it run, let's see what happened. I was  
11 feeling well clinically. My weight was level, I was  
active

12 and working and so forth.

13 Q. Let me stop you there for one second. Had you lost  
14 some time from work as a result of the prostate cancer?

15 A. Not a great deal. I was out of work for three weeks  
16 after the surgery and occasionally I needed time to go to  
17 see doctors, but I was able to maintain a fairly good  
18 schedule of work. It was not noticeably affecting my  
19 workload.

20 Q. And did you return to full-time work at some point  
21 after that?

22 A. Oh, yes, I worked -- within a month after the  
surgery,

23 I was back to full-time work.

24 Q. And so what happened next in the course of the  
25 prostate cancer?

26 A. Dr. Rosenbloom and I watched the progress of the PSA  
27 levels and we also took periodic bone scan tests and MRIs,  
28 which would help us determine whether there were any  
tissue

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1 formations that were unusual and also whether any of the  
2 prostate -- whether the disease had entered the bone  
system.

3 The bone scans were always negative.

4 The MRI, at one point, showed a slight elevation of  
5 the size of one lymph node, and the PSA continued to rise.  
6 And so we were sort of under the gun to make a decision as  
7 to whether we start the hormone therapy. Dr. Rosenbloom  
8 suggested that to help myself feel less anxious, that I  
seek

9 consultation from colleagues at Stanford, which I did in  
10 January '91 or '92, I forget which. It must have been  
'92.

11 I forget now.

12 Q. What happened at that point?

13 A. The consultation was basically that there was no  
rush

14 to apply the hormone therapy because my clinical condition  
15 continued well, and they said that there's an optimal time  
16 at which hormone therapy should work, but that optimal  
time

17 is not there for me as yet.

18 In other words, you can always reduce the PSA level  
by

19 administration of these hormones, but it's your privilege  
20 when you want to do that. And so I agreed with them. I



21 said I would wait to see what happened. At that time the  
22 PSA was around 34, I think. So we continued to wait and  
23 took the MRIs and bone scans periodically and meanwhile,  
the  
24 lymph node, with the MRI, had decreased in size. It  
almost  
25 vanished without any hormone therapy.

26 Q. That was before you ever started on it?

27 A. Yeah. And so that was interesting, and Dr.  
Rosenbloom

28 took that to suggest that maybe I was having a good fight  
to

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1 keep that lymph node system inactive.

2 And then when we got to the summer of '94 -- I think  
3 it was '94 -- no, it couldn't have been -- I'm not sure  
4 what. Anyway, my PSA went up to 72, which was a little  
5 alarming, and so I went to consultation with Dr. Steven  
6 Strum, who I had heard at a lecture one time. He spoke  
7 about the results of research with the prostate, and he  
took

8 a position of definitely endorsing that I start the hormone  
9 therapy.

10 I informed Dr. Rosenbloom about it. I had taken all  
11 my evidence, all my tests to Dr. Strum. I was not doing  
12 this without Dr. Rosenbloom's knowledge. And Rosenbloom  
13 then said to me -- this was in August, he said -- oh, yes,  
I

14 think it was in '93, August of '93. He said, "Do you want  
15 to start this hormone?" I said, "Sure."

16 Well, I started the hormone therapy and wouldn't you  
17 know it, the PSA went down to zero in two days, which was  
18 what the people at Stanford had told me. They said,  
19 "There's an optimal time to start hormone therapy and you  
20 can manipulate the PSA level with it," and this is exactly  
21 what happened. And it's been zero ever since.

22 Q. Have you had any symptoms related to the prostate?

23 A. Symptoms related to the prostate? No. I mean, the  
24 size of the -- the prostate was gone. I had digital  
25 examinations periodically, but there was no return of the  
26 tissue. There was mild incontinence at the beginning,  
there

27 was also some mild impotence which ultimately improved, so  
28 there was a full return to being able to have an erection

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1 within six or eight months, which was fine. And there's  
2 been no sequelae, except I do have some incontinence from  
3 time to time with the results of that surgery.

4 Q. And other than that, before the diagnosis of the  
5 mesothelioma, were you feeling okay?

6 A. I was feeling well, fully active, doing the things I  
7 needed to do, feeling good, full-time work. The years of  
8 '92 and '93 were good years, basically, in terms of my  
9 health.

10 Q. What is your understanding of your current status  
with  
11 respect to the prostate cancer?

12 A. My understanding is that it has been in remission  
for

13 some time. I continue on the hormone therapy. My PSA  
14 remains at zero. I have no symptoms related to it and it  
15 requires no medical attention.

16 Q. Now, when were you diagnosed with the mesothelioma?

17 A. In -- definitively in August. I had entered the  
18 hospital in July 17th under the care of Dr. Art -- Arthur  
--

19 I forget his last name. It will come to me in a little  
bit.

20 He was a chest surgeon, who did what's called a  
thoracotomy.

21 Q. Before we get to the thoracotomy --

22 A. Arthur Weber.

23 Q. -- what kinds of symptoms were you having that  
caused

24 you to end up in the hospital?

25 A. What kind of symptoms was I having?

26 Q. Yes.

27 A. Oh, back in April, March or April, I developed  
28 shortness of breath, which was surprising.

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1 Q. Why was it surprising?

2 A. It never happened to me that I would have shortness  
of

3 breath. I'm a swimmer. I swim every morning. And one  
4 morning I got in the pool and couldn't swim across the  
pool,

5 and I knew something was wrong, so my internist had me go  
6 see a lung specialist, and I had x-rays and various  
studies,

7 and he then thought that I had what was called a pleural  
8 effusion, which was an accumulation of fluid around the  
9 lung.

10 And that could have multiple reasons, and so I then  
11 went back to my oncologist, who removed one-and-a-half  
12 liters of that fluid from my chest wall, the chest area,  
and

13 submitted all that fluid to the laboratory for  
examination.

14 Q. Were you told the results of that?

15 A. Yes. The results were nothing. They didn't find  
16 anything wrong with the fluid. But the production of the  
17 fluid continued. And so they knew that something was  
wrong,

18 even though that the fluid examination did not produce any  
19 positive results.

20 And so then an arrangement was made for me to see  
21 Dr. Weber, whose name slipped my mind for a moment, and he  
22 did this thoracotomy, which was intended to get into the  
23 chest to remove a sample of tissue for a biopsy, which was  
24 done on July 17th.

25 Q. Was that done in the hospital itself?

26 A. At Cedar Sinai Hospital, yes. And while he did  
that,

27 he did what's called a pleuradesis, (phonetic) which has  
to

28 do with fusing the two sides of the pleura so that fluid

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1 doesn't accumulate there anymore. And if that's

successful,

2 that's fine, because then any production of fluid is  
blocked

3 from going in the pleural cavity.

4 He did that pleuradesis, and that was effective  
5 because I've never had any more of that in the pleural  
6 cavity, but he also removed the tissue, and in removing the  
7 tissue, the microscopic examination proved that it was  
8 mesothelioma.

9 Q. Now, initially, was the first diagnosis after they  
10 determined that that was malignant, was it mesothelioma?

11 A. The first diagnosis that was made, which was sent  
back

12 to my oncologist's office, was adenocarcinoma.

13 Q. The same type of cancer that the prostate was?

14 A. The same label they had given to the prostate, and I  
15 think also to the carcinoma of the bowel. I think they  
16 called it that, too. But Dr. Rosenbloom was on vacation  
at

17 the time and I wanted an opinion of another oncologist, so  
I

18 went to see a Dr. Mosher, who was a man that I had known  
19 before, and he said: I think we should take this sample

and

20 send it for examination by electron microscope, because  
21 that's usually the way in which these diagnosis of  
22 mesothelioma is made.

23 Q. Did he tell you that that was a potential diagnosis  
at

24 that time?

25 A. Yes, yes, he said that was a potential diagnosis,  
and

26 he thought that I deserved to have that study done.

27 Q. Had you ever heard of mesothelioma before that?

28 A. No, I never heard of that. I've learned a lot about  
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1 it since, but I didn't know about it until last July.

2 Anyway, so the results came back this time with  
3 clear -- the fibers that were contained in the sample were  
4 clearly those of, they felt, of mesothelioma. And then as  
5 you know, as properly submitted, I've had those laboratory  
6 slides sent to -- I took them to Sloan Kettering in New  
7 York.

8 Q. Why did you go to Sloan Kettering?

9 A. I went there in October of last year. I wanted  
10 another opinion about my condition.

11 Q. What had you been told up until then, once they made  
12 the diagnosis of mesothelioma, about mesothelioma?

13 A. It wasn't so much what I was told as what I began to  
14 read. It scared the hell out of me. Because the typical  
15 first line or two of writing about mesothelioma, the  
article

16 says, "Patients with this illness die within six to eight  
17 months from the time of diagnosis."

18 And so that was not a very good introduction for me  
19 into the whole subject, having read about this in  
September

20 of last year and being told by my doctor that the  
treatment

21 options were scant, they couldn't do surgery because  
they'd

22 have to remove a lung, and other organs or tissue. The  
23 radiation was out because it would puncture the lung.  
24 Chemotherapy was a very long shot because only 10 percent  
of  
25 the people who ever got treatment with mesothelioma ever  
26 pulled through or improved. So this is what I had heard  
27 from my doctor.

28 I went to Sloan Kettering for another opinion, and  
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1 they said the same thing. I consulted their chief surgeon,  
2 their chief oncologist, and so I came back with a very  
3 pessimistic feeling about the whole thing. Especially that  
4 if we ever got around to chemotherapy, that we had a slight  
5 chance that it would be successful. So that's what I  
6 learned about it.

7 Q. Did you continue being treated by Dr. Rosenbloom?

8 A. Yes, I continued -- I think he's a fine doctor and he  
9 continued to see me.

10 Q. What kinds of things would he do? This is about  
11 September that you went to Sloan Kettering?

12 A. I went to Sloan Kettering on October the 4th. And  
13 then when I returned to Los Angeles, Dr. Ilson from Sloan  
14 Kettering reviewed his findings with Dr. Rosenbloom, and  
15 they both concurred that palliative treatment was  
desirable.

16 Q. What does that mean?

17 A. That means treatment that's designed to make me feel  
18 more comfortable, not to cure me, but to feel more  
19 comfortable. It's essentially what Dr. Horn told me in  
20 December. He said, "There is no treatment for you." He  
21 says, "I don't think you're going to make it. Go out and  
22 have a good time. If you get chemotherapy, it will upset  
23 you too much and your way of life will be significantly  
24 altered, so relax and enjoy your life a little more."

25 Q. What happened after December? What happened in  
26 January?

27 A. In January, Dr. Rosenbloom suggested that I have a  
CAT  
28 scan to see what the progress of this illness was.

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1 Q. How were you feeling up to this point in time?

2 A. Lousy. I had lost 30 pounds, I felt terrible, I was  
3 weak, and I had what looked like a pneumonia. I once had  
to  
4 go to an emergency visit to the hospital because I could  
5 hardly breathe, I couldn't sleep. It was awful. And  
6 Rosenbloom saw the CAT scan and he says, "Well, we've got  
to  
7 go for the chemotherapy, we've got to take our chances,"  
and  
8 I did. I started the chemotherapy in January.

9 MS. CHABER: Are we going to take a break?

10 THE COURT: Sure. We will take a ten-minute recess  
at  
11 this time, ladies and gentlemen, until 20 minutes to 3:00.  
12 Please keep in mind the admonitions given to you before  
that  
13 you are not to form an opinion about it, you are not to  
14 discuss the case with anybody or amongst yourselves. If

15 anyone attempts to discuss the case with you, advise the  
16 Court of that fact. Return at 2:40, please.

17 (Recess taken.)

18 THE COURT: Everybody is present, so you may resume  
19 your examination.

20 MS. CHABER: Thank you, Your Honor.

21 Q. Dr. Horowitz, we have a fan on now, so you're going  
to

22 have to keep your voice a little bit louder than you've  
been

23 talking; okay?

24 Dr. Horowitz, have any of your physicians told you  
25 that the mesothelioma you have is in any way related to  
your

26 previous cancers?

27 A. No, no one has said that to me, that there's any  
28 relationship between the current mesothelioma and the

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1 previous cancers.

2 Q. Have you asked them that question?

3 A. Oh, yes, I've asked them that.

4 Q. Now, in January, you indicated that you and  
5 Dr. Rosenbloom decided to start chemotherapy?

6 A. Yes.

7 Q. And who was the person who was going to be dealing  
8 with the chemotherapy? Was that also Dr. Rosenbloom?

9 A. Yes. I would do it in his office. He had a section  
10 in his office that's set aside for the administration of  
11 chemotherapy, yes.

12 Q. And when was the first session that you had?

13 A. I think it was in the second or third week of  
January.

14 Probably the third week of January.

15 Q. And at that point in time, what do you do when you  
16 have chemotherapy? What's the process like?

17 A. Well, you lie down. You are given a drug  
18 intravenously that prepares you for receiving the  
subsequent

19 drugs that are administered. You are then -- the first  
drug

20 that's administered is an antinausea compound, because  
21 nausea is a very significant part of chemotherapy. This  
is

22 then followed by the administration of two drugs. In my  
23 instance it was two drugs. It could be more than two.

24 Q. What were the two drugs?

25 A. The two drugs at the beginning were cis-platinum and  
26 adriamycin, a-d-r-i-a-m-y-c-i-n. These are the drugs in  
the

27 beginning that were used. And the schedule that I was  
given

28 was to appear for chemotherapy for four hours three

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1 consecutive days every third week. In the period of four  
2 months, I had a series of six of these three-day-a-week  
3 treatments.

4 But the reason it was for four hours was that the  
drug

5 was so potent. They administered it in a slow way so that

6 it would take four hours for it to drip into you. And then  
7 you'd return the next day and the next day. Well, I don't  
8 know how much you want me to tell you about all of this.

9 Q. After the first chemotherapy, did you have -- first  
of

10 all, when you're having the chemotherapy, is it painful?

11 A. It's not painful as it is that you begin to feel the  
12 effects of the nausea. And that's significant. I mean, I  
13 had no way of knowing what was going to really happen. I  
14 had some discussions with people. I took out books about  
15 the effects of chemotherapy, how to deal with them and all  
16 of that, but there's no way of appreciating the  
deleterious

17 effects and the awful feelings associated with it. It  
18 was -- as a matter of fact, it was so bad, that I had to  
19 cancel my next month's work. I did not work the whole  
month

20 of February because the effects of the chemotherapy after  
21 the first treatment were so bad.

22 Q. When you first started the chemotherapy,  
approximately

23 how many clients did you have?

24 A. How many clients did I have? Well, not the number  
of  
25 clients is the number of treatment hours that I scheduled.  
26 I would be better able to tell you that.

27 Q. Some people come more than once a week?

28 A. They come anywhere from one to four times a week.

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1 Those in analysis come four times a week. Am I speaking  
2 loud enough for you?

3 Q. A little bit louder.

4 A. Okay.

5 Q. So how many treatment hours?

6 A. So I would say I had 25 to 30 treatment hours  
7 scheduled before this chemotherapy began. I think that was  
8 about right. But then I took the month of February off.

9 Q. Before you took the month of February off, did your  
10 patients know about your diagnosis?

11 A. Yes, yes, I told my patients about my diagnosis.

They

12 could see that there was something wrong with me. I had  
13 lost 30 pounds and I didn't sound right. My voice had  
14 changed. I looked bad, I lost my hair with the  
15 chemotherapy, but no, I was very honest with with them,  
and

16 I gave them an opportunity to transfer to other analysts  
if  
17 they wished to do that, or whatever they wanted to do.

But

18 none did, actually. But as we went along, several  
19 established times for termination. In other words, they  
20 thought that we could come to an end somewhere soon.

21 I'll give you an example of something that happened  
to

22 me that was totally unforeseen. I was with a patient one  
23 day and suddenly, I began to have chest pains,  
24 irregularities in breathing, stabbing pains in the chest,  
25 with even pain radiating down my arm. I thought for sure  
I

26 was having a heart attack. So I arranged to have the 911

27 called and I was taken to the hospital, et cetera.  
28 And after a long and anxious period, it was  
discovered

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1 that I had -- this was one of the consequences of  
2 chemotherapy that I didn't know, because I was beginning to  
3 get pains in my chest associated with the effects of that.  
4 And I began to realize that chemotherapy, the toxic agent  
5 that chemotherapy is begins to affect all systems, the  
6 poisons of it. So that it affects your respiratory system,  
7 your digestive system, your nervous system, all the  
systems,

8 and this affected the system that simulated a heart attack.

9 And it was difficult, but I came home that afternoon  
10 and I decided I just wasn't going to work this next month  
11 because I didn't want to have to go through something like  
12 that again.

13 Q. So you took the month of February off?

14 A. I took the month of February off.

15 Q. And how long after the first session of chemotherapy  
16 did it take for you to recover to be able to do things  
17 again?

18 A. Well, the recovery is interesting. You see, there's  
a

19 three-week interval between treatments, and for ten days  
or

20 so after the treatment concluded, I'm not able to eat  
21 because the nausea is so penetrating, so difficult. And  
22 this adds to the problem with the loss of weight. There's  
23 no way you're going to gain this weight back while you're  
in

24 the process of chemotherapy.

25 Q. Were there things that you attempted to do?

26 A. That I attempted to do about gaining weight?

27 Q. Yes.

28 A. Oh, I was drinking all these supplements like Ensure

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1 and all kinds of milk shakes and all kinds of ice creams.

I  
2 was doing exactly the kinds of things that people are  
3 careful about in everyday life. I just needed to gain the  
4 weight because I knew that if there was an interval that  
was

5 clear where I was able to gain weight, I would lose it  
again

6 when I started the next round of chemo.

7 So it was ten days after the chemo concluded that I  
8 was able to start eating again. But then within a week  
9 after that, the anticipation of going back to the chemo  
made

10 me lose my appetite all over again. I really had a bad  
11 time with this nausea.

12 Q. So you'd go back every three weeks?

13 A. I'd go back every three weeks. The second time  
around

14 Dr. Rosenbloom changed the regimen of the medication.

15 Q. Did he tell you why?

16 A. I'm sorry, yes, he told me why. At the end before  
you

17 start each round of chemotherapy, you get a set of x-rays.  
18 He had chest x-rays taken of me to see what progress there  
19 was made since the last time.  
20 So the second time around I had the chest x-rays  
done,  
21 and he said before I went, started the second treatment,  
he  
22 says, "I'm going to change your medication this time  
because  
23 I'm not getting results fast enough, because I have an  
idea  
24 of how quickly I need to see the results on the x-rays  
25 before I have a sense that the chemotherapy is going to  
help  
26 you."  
27 So he gave me what's called SVP 16, which is among  
the  
28 most potent chemical agents that they have yet discovered.  
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1 They use that in cases of advanced lung cancer. And  
2 adriamycin was dropped. I kept on with the cis-platinum.  
3 Q. Let me just stop you there for a minute. Did  
4 Dr. Rosenbloom tell you if this was something that he had  
--  
5 whether there was other reports of people using this on  
6 people with mesothelioma?  
7 A. Before he decided which drug to use, which  
combination  
8 of chemical agents to use, he said he had done a literature  
9 research one weekend where he studied, through a computer,  
10 all the reports in the literature about the treatment of  
11 mesothelioma with chemotherapy. And these were the two  
12 drugs that had the most common use, that seemed to be  
13 useful.  
14 But then he gave up on this adriamycin after that  
15 first test because he knew more about the SVP 17 or 16,  
and  
16 it was like a miraculous thing happened, because after  
this  
17 round of chemotherapy, I began to be able to walk, I began  
18 to be able to swim a little bit, I began to be able to  
walk  
19 uphill, things that I couldn't do. My office is up on the  
20 second floor of the building behind my house. I had  
trouble  
21 going up to the office, but now with this second series of  
22 treatments behind me, I found it's so much easier.  
23 And my patients were telling me that I sounded  
better  
24 because I had more air in my lungs that I could use.  
25 Previously, the air was so bad, that when I started a  
26 sentence I had to hurry up and speak so that I could  
finish  
27 the sentence before the air gave out and I didn't sound  
like  
28 myself. I'd start to say something and I'd say, "and so  
you

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1 have to start doing that," and by then the air was gone and



2 I had to start all over again.  
3 Q. I think you just drove the court reporter crazy.  
4 A. You could write anything down on that side. But  
5 things began to be much better after the second thing, and  
6 then progressively, with each time I returned, I took again  
7 an x-ray, and the x-rays began to show progress, and I was  
8 amazed at that.  
9 Q. And so what did Dr. Rosenbloom tell you was  
happening?  
10 A. He was saying that the x-rays were looking better.  
11 And then I had a CAT scan in January and by April, he  
12 suggested another CAT scan. And this CAT scan, which was  
13 two months after the first one, really began to show some  
14 improvement. And then we repeated that in June after the  
15 whole series was over, and the radiologist was  
unbelievably  
16 happy. He said most of it wasn't there. And I was happy,  
17 too.  
18 Q. And did Dr. Rosenbloom tell you whether or not you  
had  
19 been cured?  
20 A. No, he didn't say I was cured, he said, "You could  
21 call this a remission." He wouldn't say anymore than  
that.  
22 He didn't promise me anything, and he said, "We will keep  
it  
23 like this, if we can."  
24 Q. As a result of the chemotherapy, have you had any  
25 ongoing side effects?  
26 A. Oh, yes. I've had a lot. I have a series of what  
was  
27 called peripheral neuralgia. That is, I have numbness and  
28 electrical tingling in my fingers running up my hand. I  
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1 have them in a couple fingers in this hand.  
2 I've also developed numbness and electrical tingling  
3 in the soles of my feet and running up my calf muscles, and  
4 my stability is poor. When I stand up, I have to hold on  
5 before I can feel erect and I can move straight. My whole  
6 sense of balance is affected.  
7 Q. How would you have been before you started the  
8 chemotherapy in January?  
9 A. I never had that. I mean, I felt fine. This  
business  
10 with my -- well, Dr. Rosenbloom recently had me take a  
11 series of MRIs of my neck. He thought maybe I had a  
pinched  
12 nerve, or something else was happening in my neck, and  
they  
13 haven't been able to find it. I'm still under  
investigation  
14 with a neurologist about that, because I know that there's  
15 something wrong.  
16 I mean if I -- let's say I'm walking across the  
street  
17 and I think I see a car coming, so I want to just trot  
18 across the street to get there, I can't do that. I can't  
19 get my legs up to start going faster. So that's been with  
20 me now since the chemotherapy.  
21 Q. And has the hands, the problems with the hands,  
caused

22 you to give up or lessen any activities?  
23 A. Yes. I play the piano, and so once that began, I  
just  
24 couldn't play the piano, so I wasn't playing the piano  
from  
25 October or December -- no, really, since January, when the  
26 chemotherapy began until -- I started again in July, and  
it  
27 feels good, although it's still there, but my teacher says  
28 to sort of play through the frailty, play through the  
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1 inadequacy.  
2 When when my pinky and second finger hit the piano, I  
3 don't know that I'm able to hit the note that I intend to  
4 hit. I can only hear it and know whether I'm right or  
5 wrong.  
6 Q. And up until about April of this year, what was your  
7 activity level like?  
8 A. Up until April of this last year?  
9 Q. Yes.  
10 A. It was good. I was feeling normal.  
11 Q. This year?  
12 A. Up until April of?  
13 Q. Of this year.  
14 A. Of 1985?  
15 Q. 1995.  
16 A. I'm sorry, 1995. What's my activity level been like  
17 this year? Is that your question?  
18 Q. Right. Before April when you had the CT scan with  
19 improvement.  
20 A. It was very limited. I did hardly anything. I  
21 couldn't do -- Shirley and I would take walks once a day  
for  
22 about 20 or 30 minutes, and that was the extent of my  
23 physical activity. I couldn't swim, I couldn't walk fast,  
24 and I couldn't do a lot of things. I couldn't run. I  
like  
25 to play basketball with my grandchildren, and I couldn't  
do  
26 any of that.  
27 Q. Were those things that you had been doing before you  
28 were diagnosed with the mesothelioma?  
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1 A. Oh, yeah, very active life, yes.  
2 Q. Have you increased your activity since April?  
3 A. I've increased my activity since June.  
4 Q. Since June?  
5 A. Since June. The chemo ended May 14th and beginning  
in  
6 June, and then into July and now in August, there's been a  
7 noticeable pick up in my ability to do things, exercise,  
8 except for the unsteadiness of gait and other things that  
9 I'm talking about with this peripheral neuralgia. So I do  
10 what I can. I try to keep going.  
11 I've been able to gain back about 22 pounds of the  
30  
12 that I lost, and I regard that as a wonderful achievement,  
13 because that's added to my energy, sense of energy.  
14 Q. When you had the chemotherapy, did you lose your

hair?

15 A. Yes, my hair was gone by the second administration  
of  
16 it. It just vanished. Not just the hair on my head, but  
17 all my body hair, including my pubic hair was gone.  
18 Everything. It was gone.

19 Q. And have you -- I see you've regained your --

20 A. It's coming back a little, yes.

21 Q. In terms of your work, have you been able to resume  
22 full-time work?

23 A. Oh, no, no, nowhere near that. You see, my  
institute,  
24 which is composed of a wonderful group of people, we all  
25 sort of refer cases to one another, either students in  
26 treatment or people who need supervision or people in a  
27 community who need treatment. But once the word was out  
28 that I was ill, I was not getting any referrals,  
obviously,

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1 and I couldn't take any referrals. I wasn't going to  
2 promise anybody anything.

3 And so that whole -- I had cases referred to me in  
the  
4 months of January and February, and I just had to turn them  
5 away. So gradually, my practice has deteriorated to now  
6 where I have about seven hours a week and in a month. It  
7 will be down to two, because a couple of people are  
leaving,

8 but I'm not picking up any new patients.

9 So the word gets out that you're not well or haven't  
10 been well. And I'm trying to get the word out that I'm  
11 better. But I may be retired sooner than I thought.

12 Q. Before you were diagnosed with mesothelioma, did you  
13 have intentions of retiring?

14 A. Yes, I thought about it. I thought about  
15 progressively cutting back in my hours and somewhere this  
16 year or next year to cut back significantly. In my  
17 business, people don't literally actually retire.

18 Q. Why is that?

19 A. It's easy enough to see people. They just come to  
20 your office and you talk to them and you don't see as many  
21 as you used to, but then there are those who want to hang  
22 on, want to keep talking, so you have a few around that  
you

23 work with. But I don't know too many shrinks who actually  
24 retire. Shrinks, I'm sorry, I use that word --

25 Q. That's all right. Everybody uses that.

26 A. Okay.

27 Q. I think somebody asked you how that came about,

28 A. Everyone's asked me that, and I gave some answer  
which

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1 I hope it's right. It has to do with the shrunken head  
2 notion of people in Africa who will use the shrinking of  
3 heads as a form of treatment.

4 Q. You don't literally do that, do you?

5 A. No.

6 MS. CHABER: I'd like to have five photographs marked  
7 as plaintiffs' next in order.

8 THE CLERK: Plaintiffs' Exhibits 37, 38, 39, 40 and  
41  
9 marked for identification.  
10 (Plaintiffs' Exhibits 37 - 41 marked for  
11 identification.)  
12 MS. CHABER: Q. Dr. Horowitz, I'm handing you five  
13 photographs with exhibit numbers on the back, 37 through  
41,  
14 and I'd ask you to go through them one at a time and  
explain  
15 when they were taken and who's in them.  
16 MS. CHABER: May we display them, Your Honor? I  
move  
17 them into evidence.  
18 MR. OHLEMEYER: No objection.  
19 (Plaintiffs' Exhibits 37 - 41 received in evidence.)  
20 THE WITNESS: This is a picture taken of my wife and  
21 myself at my 50th college reunion in 1993 back in New  
York.  
22 This is what I looked like in 1993.  
23 In that same year in October, my youngest daughter  
was  
24 married, and this is my daughter and I dancing at that  
25 wedding. This is a picture of myself and my wife dancing  
at  
26 my 70th birthday party two years ago.  
27 Now, these two pictures are pictures after the fact.  
28 In other words, this shows me on father's day of this year  
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1 with two of my grandchildren. They came down to visit with  
2 me on father's day which was, I think, June 16th or 17th.  
3 It was a day in which I had already been told that I was in  
4 remission, so we were all pretty happy about that.  
5 My physical condition was pretty rundown still, and  
6 you could see what I looked like then compared to what I  
7 looked like before. And there's a picture of me with my  
son  
8 and son-in-law, even on Father's Day in June, still having  
9 no hair.  
10 MS. CHABER: May I pass them, Your Honor?  
11 THE COURT: All right.  
12 (Pause.)  
13 MR. BRAKE: Your Honor, in the interest of  
concluding  
14 with today's witnesses, I wonder if we could continue the  
15 examination.  
16 THE COURT: Go ahead.  
17 MS. CHABER: Q. Dr. Horowitz, have you been able to  
18 estimate how much income you have lost as a result of your  
19 mesothelioma?  
20 A. I think I provided your office with some figures. I  
21 don't recall them offhand.  
22 Q. Would it help you to refresh your recollection to  
look  
23 at what you provided?  
24 A. Yeah, what I had written.  
25 MS. CHABER: For the record, I'm handing Plaintiff  
26 further responses to Defendant Lorillard Judicial Counsel  
27 Form Interrogatories dated August 16th, 1995.  
28 Q. Why don't you take a moment to review it and see if  
we

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1 can shorten this?

2 A. May I go on?

3 Q. Yes.

4 A. The first category of loss has to do with all the  
time

5 that was lost from my work in going to doctors for  
6 consultations, going in for surgery, having chemotherapy  
and

7 so forth, and my fees and my work run 100 to \$120 an hour.

8 So all the missed hours that I had to be away are shown  
9 here. Do I have a grand total?

10 Q. Did we add it up, is the question?

11 A. And then another group of loss has to do with  
12 premature termination of patients, because I did not know  
13 how long I'd be able to work with them. I talked with  
them

14 about leaving or transferring to someone else, and so  
15 there's totals here of about \$20,000 that has to do with  
16 prematurely terminating patients, and so forth.

17 And then there's another group of people that I had  
to

18 turn away, that is people who were referred to me who I  
19 could not see. These are people who would be seeing me  
once

20 or twice a week for an indefinite period of time, so one  
21 could only approximate what loss there is on that. I  
would

22 estimate another 20 or \$30,000 from that. And the charges  
I  
23 have here are for a total of 31,000,

24 Q. And the 31,000 is for which of those categories, the  
25 first category --

26 A. Yeah.

27 Q. -- about doctors?

28 A. Each patient would have stayed in treatment at least  
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1 through the year 1995. These are those patients that I had  
2 to turn away. So for over an 11-month or 12-month period,  
a

3 total income of about 34,000 was lost because I couldn't  
4 work with any of these four or five patients.

5 Q. Can you estimate what the income loss was as a result  
6 of the first category, going to doctors visits and so  
forth?

7 A. That estimate.

8 Q. No one totaled it?

9 A. I'm sorry, I don't see a total of those hours, unless  
10 we took the time now to start doing that. I would guess  
11 that ran into 40 or \$50,000, over a couple year period,  
that

12 that was lost, and all the hours lost in chemotherapy, I  
13 think. So a rough approximation of the loss of time and  
14 effort associated with mesothelioma is probably in the  
15 neighborhood of \$100,000, something like that.

16 Q. And can you estimate -- you indicated that you were  
17 going to try to cut down and phase out your work over the  
18 next couple of years?

19 A. Yes, I probably will within this year, because I

don't

20 see any new patients coming on. I have terminated nearly  
21 all of those, and I have seven hours of treatment left and  
22 two patients are leaving, so I'll have two hours left  
within

23 a matter of a couple months, so by the end of this year,  
I'm

24 a guy who's out of work.

25 Q. Can you estimate what that will amount to in lost  
26 income over the next two or three years?

27 A. I would say very, very modestly, even at the rate of  
28 \$50,000 a year, would be \$100,000 over the next couple of  
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1 years.

2 Q. Dr. Horowitz, are either of your patients -- you  
3 mentioned that your father had died. Is your mother still  
4 alive?

5 A. Yes, my mother is alive at age 94.

6 Q. And since you've had this recovery from the  
7 mesothelioma, have you been able to do any traveling?

8 A. Yes, I've traveled. We went on a cruise in June that  
9 was a wonderful, liberating feeling to get out of the whole  
10 feeling of being stuck with the mesothelioma; that is,  
with

11 the chemotherapy, particularly to be able to go out and  
get  
12 some air and start eating again.

13 So we went on that trip, and we've been on a couple  
of  
14 small trips to San Francisco and to San Diego, but these  
15 have been small trips.

16 Q. And during the time of the chemotherapy, did you  
17 notice any changes in your mental capacity?

18 A. Yes. There was changes in my mental capacity. I  
was  
19 very depressed. It was terribly depressing to be  
struggling

20 with that. I mentioned previously that I sought and got  
the

21 help of a psychiatrist who saw me once a week for about  
22 three months to help me over that. It was very hard.

23 But I also noticed that my own power of  
concentration

24 had diminished. I was not able to read professional  
25 literature very well. If I went to a scientific meeting  
26 with colleagues, talked about things, I couldn't  
concentrate

27 beyond a very limited degree.

28 The things that I read changed. I couldn't read  
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1 nonfiction. That required too much concentration. I went  
2 to simple little stories or detective stories. I like  
3 sports very much and I read the sports pages regularly, but  
4 I even had trouble keeping up with who was doing what and  
5 where. It was hard to keep myself occupied mentally.

6 Q. Is that improving?

7 A. That's improving. That's improving. And now that my  
8 patients are gone, my mind is active and good again, and I  
9 need somebody to work with and things to do. But I'm

10 finding things to do. I mean, I wouldn't feel sorry for  
me  
11 on that count. That's improving.  
12 Q. Have you noticed any changes in or any effect on  
13 Shirley as a result of the mesothelioma?  
14 A. Oh, yes, there were many effects on Shirley during  
15 that time, because she's very loving and very devoted, and  
16 she didn't know what to do for me. She didn't know what  
17 kind of meals to prepare that I might be able to eat or  
what  
18 to get me to be helpful to me.  
19 It was terribly hard on her, and I felt awful that  
she  
20 was going through all of this. And she had, you no know,  
21 this last spring, in the spring of '94, she herself went  
22 through a cancer of the breast and needed to do something  
23 about, so I was investigating my illness in the spring and  
24 she had surgery for her.  
25 So then after she was recovering, then she had to  
take  
26 care of me, and it was terrible. It was terrible for her.  
27 Not so easy for me.  
28 Q. Before you had the diagnosis of mesothelioma, what  
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1 were your plans for the future?  
2 A. Well, the plans were to progressively retire, to  
3 travel, to spend more time with my grandchildren, to maybe  
4 write a couple things that I had thought about doing, to  
5 continue to take piano lessons and improve my piano  
playing,  
6 and just to lay back and relax.  
7 Q. Have your plans changed at all since the diagnosis?  
8 A. Well, for the few months in which I was going through  
9 the mesothelioma and not knowing what the outcome might be,  
10 I was in the tank. I had no way of being able to talk  
about  
11 the future.  
12 I saw Dr. Horn in December of last year and when I  
13 started the chemo, people were talking about me like I was  
14 going to be dead by this summer, so there was no future to  
15 plan for. But now that I seem to have a reprieve, now I'd  
16 like to continue to have more of the same and worry about  
17 what to do.  
18 Q. Are you feeling more optimistic?  
19 A. I'm optimistic. If I can old my own, I'll be all  
20 right without feeling that there will be a cure for this,  
21 but at least some sense that the disease is not marching  
on  
22 in its relentless manner.  
23 MS. CHABER: Thank you. I have nothing further.  
24 CROSS-EXAMINATION BY MR. OHLEMEYER  
25 MR. OHLEMEYER: Q. Good afternoon, Dr. Horowitz.  
26 A. Good afternoon.  
27 Q. I'm Bill Ohlemeyer. We met in April at your  
28 deposition.

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1 A. Right.  
2 Q. When your doctors diagnosed you with adenocarcinoma  
of

3 the colon, did they tell you what caused that cancer?  
4 A. No, they could not.  
5 Q. And do you understand adenocarcinoma is a type of  
6 cancer just like mesothelioma is a type of cancer?  
7 A. Yes.  
8 Q. And when your doctors then diagnosed you with  
9 adenocarcinoma of the prostate, could they tell you what  
10 might have caused it?  
11 A. No, they couldn't tell me what caused it.  
12 Q. And then over the years, you've had some basal cell  
13 cancers removed?  
14 A. I've had those little pink lesions on my legs and  
arms  
15 that were removed. These are the basal cell things that  
16 don't have any real danger of getting in under the skin,  
but  
17 they are on the surface, yes.  
18 Q. Did any of your doctors involved with that tell you  
19 what might have caused those cancers?  
20 A. Yes. Excessive exposure to sunlight.  
21 Q. And has your mother had cancer?  
22 A. My mother had one kidney removed about 23 or four  
23 years ago.  
24 Q. And when you were originally diagnosed with your  
lung  
25 problems, the doctors thought it was adenocarcinoma of the  
26 lung?  
27 A. No, no, nobody ever thought that I had anything  
wrong  
28 with the organ called the lung. It was always in relation  
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1 to what was going on outside, the pleural cavity. There  
was  
2 a pleural effusion and they did not know what was causing  
3 that, but they never mentioned to me that it might be a  
4 cancer of the lung.  
5 Q. But they did mention to you that it might be an  
6 adenocarcinoma?  
7 A. No, they didn't mention, they didn't say that. The  
8 word adenocarcinoma came back from the pathologist in the  
9 first review of the slide that was based on the biopsy done  
10 by Dr. Weber, but the doctors themselves, Dr. Rosenbloom  
or  
11 even the doctor, Dr. Weber and others, never used the word  
12 "adenocarcinoma."  
13 Q. With you?  
14 A. With me.  
15 Q. From the time you had the biopsy, though, until the  
16 time they told you that you had mesothelioma, some time  
17 passed; is that right?  
18 A. The biopsy was done July 17th. I was told about  
19 mesothelioma about August the 4th or 5th, or something  
like  
20 that.  
21 Q. And at that time, at least one of your doctors told  
22 you that mesothelioma could be caused by exposure to  
23 asbestos?  
24 A. Dr. Rosenbloom said, "When had you been exposed to  
25 asbestos?" as soon as the diagnosis was heard, right.  
26 Q. And at that point, you started to think about or  
27 reconstruct where you might have been exposed to asbestos?



28 A. Right, I did.  
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1 Q. And you talked with your doctors about the troop ship  
2 in the military?

3 A. Yes.

4 Q. You talked with them about the construction in  
5 Cleveland and the construction in Los Angeles?

6 A. Correct.

7 Q. And you talked with them about the asbestos pipe  
8 covering in your basement?

9 A. Correct.

10 Q. And at some point after that, you hired a lawyer?

11 A. Right.

12 Q. And a lawsuit was filed on your behalf?

13 A. Correct.

14 Q. And that lawsuit named the manufacturers and  
suppliers

15 of asbestos products you might have been exposed to in the  
16 Army or in the construction or in your home?

17 A. Right.

18 Q. And you also hired a lawyer in Los Angeles to file  
19 another claim?

20 A. Well, that was the unemployment compensation lawyer,  
I  
21 think, associated with my working at Reiss Davis, but that  
22 has ultimately gone by the boards and that has become a  
23 nonissue.

24 Q. But when you filed -- when that lawyer filed that  
25 claim for you, you claimed that you had been exposed to  
26 asbestos at the places you worked, and it had caused your  
27 mesothelioma?

28 A. I don't know if I told them all of that and in  
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1 whatever I had submitted. I don't recall.

2 Q. Ms. Chaber's office made the appointment with Dr.  
Horn

3 for you?

4 A. Correct.

5 Q. And Dr. Horn -- you knew you weren't seeing Dr. Horn  
6 for any kind of treatment or advice about treatment?

7 A. No, right.

8 Q. And you and Mrs. Horowitz went to see Dr. Horn?

9 A. Right.

10 Q. And he took a history from you?

11 A. Right.

12 Q. Filled out some -- you filled out some forms for  
him?

13 A. Right.

14 Q. You had a conversation with him?

15 A. (Witness nodded.)

16 Q. And he asked you about your cigarette smoke?

17 A. Right.

18 Q. And you told him -- and by the way, was that the  
first

19 time you had been asked to sit down and think about what  
20 cigarettes you smoked and when you smoked them?

21 A. Right, that's the first time I had a smoking history  
22 taken.

23 Q. And you told Dr. Horn that you started smoking in

24 about 1944?  
25 A. Right.  
26 Q. And you told Dr. Horn that sometime after you moved  
to  
27 Cleveland, you started smoking Kent cigarettes?  
28 A. Kent filter cigarettes, right.  
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1 Q. And you told Dr. Horn that in, I think you said in  
2 1963, you quit smoking?  
3 A. Uh-huh.  
4 Q. And you told Dr. Horn that when you started smoking  
5 Kent, the filter was blue; is that right?  
6 A. Yes.  
7 Q. And you told them that it was the color of your  
8 father's eyes?  
9 A. I don't remember whether I told him that or not, but  
10 that's what I was thinking about at the time.  
11 Q. And you told him that four years, about four years  
12 after you started smoking Kent, the color of the filter  
13 switched to white?  
14 A. That's right.  
15 Q. And you told Dr. Horn that you smoked probably never  
16 more than a pack of cigarettes a day?  
17 A. Right.  
18 Q. And then the lawsuit changed, Lorillard was added,  
19 Hollingsworth and Vose was added; is that right?  
20 A. Yes.  
21 Q. And your lawyers arranged for a deposition to be  
taken  
22 in Los Angeles?  
23 A. Right.  
24 Q. And we came down to ask you questions?  
25 A. Right.  
26 Q. Ms. Chaber asked you questions; is that right?  
27 A. Yes.  
28 Q. And there were other lawyers who asked you  
questions?

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1 A. Right.  
2 Q. And at that deposition, you weren't shown any  
3 photographs like you were today; is that right?  
4 A. No, that's correct.  
5 Q. You have to answer for the court reporter because  
when  
6 you nod, I know what you're trying to say, but she's just  
7 trying to listen.  
8 A. All right.  
9 Q. And at that deposition, you weren't asked about  
10 television shows and magazines, things like that?  
11 A. No, that's not true. You asked me what kind of  
12 magazines we subscribed to that I read, both professional  
13 and for family entertainment.  
14 Q. That's right. And Ms. Chaber asked you some  
questions  
15 about what cigarettes you smoked and when you smoked them?  
16 A. Right.  
17 Q. And I got to ask you some questions about that?  
18 A. Right.  
19 Q. And you told us at the deposition that you switched

to  
20 Kent cigarettes sometime after you moved to Cleveland?  
21 A. Correct.  
22 Q. You told us that at the time you started smoking  
Kent,  
23 that Marlboro filtered cigarettes and Kool filtered  
24 cigarettes were on the market?  
25 A. I don't believe I said that. I said that I was  
aware  
26 that friends in Cleveland were smoking Marlboro and I  
27 remember seeing filters, but I did not remember timing  
this  
28 to say at the time that I started to smoke Kents that I  
also

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1 saw that -- saw those. I don't recall that part.  
2 Q. Well, Doctor, let me show you a portion of that  
3 deposition.  
4 MR. OHLEMEYER: Your Honor, it's page 149, line 21  
5 through page 150, line 4.  
6 (Portion of videotape deposition being played.)  
7 MR. OHLEMEYER: It was actually page 148, Your Honor,  
8 I'm sorry.  
9 Q. And that was your testimony at the deposition?  
10 A. Yeah. The phrase that is very critical in that  
11 question of yours had to do with "at the time that you  
12 switched to Kent." I don't think that was true at the  
time  
13 that I switched to Kent. That is to say, I don't recall  
14 that there was a juxtaposition of time when either Kool or  
15 Marlboro had a filter type. I don't know what the history  
16 of Marlboro was at all, but I know while I was in  
Cleveland  
17 there were Marlboro filter tips.  
18 Q. Let me ask you, Doctor, if you remember this  
question  
19 and that answer.  
20 "Can you think or can you describe for me the brand  
21 names of any other filtered cigarettes that were on the  
22 market at the time you switched to Kent?"  
23 And your answer was: "Well, I think Kool had a  
filter  
24 tip, I think. I can't recall any others."  
25 And I asked: "What about Marlboro?"  
26 And your answer was: "Marlboro, I think, had a  
27 filter. Yeah, they had a filter flip top box, I  
believe."?  
28 A. Yeah, but where I think I erred in that answer was  
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1 that it was not specific to your phrase at the time. I  
2 wasn't alert to the use of the phrase.  
3 Q. And you also -- by the way, Doctor, at the  
deposition,  
4 do you remember telling me that if you didn't understand  
any  
5 of the questions I asked you, that you'd let me know?  
6 A. Sure.  
7 Q. And at the deposition, you also told us that at the  
8 time you switched to Kent, it was a popular brand of

9 cigarettes?  
10 A. Yeah, I gathered it was, yeah.  
11 Q. And again, at the deposition, you told us that the  
12 color of the filter, when you started smoking Kent, was  
13 light blue?  
14 A. Blue, yes, light blue.  
15 Q. And that four years later, it suddenly became white,  
16 it wasn't blue anymore?  
17 A. That was my memory, right.  
18 Q. And at the deposition, do you remember telling us  
that  
19 when the color of the filter changed, that you recalled  
the  
20 word Micronite was not used to describe the filter  
anymore?  
21 A. No, did I say that? If I said that, I was wrong,  
22 because the box that I just saw had the word "Micronite"  
on  
23 it, and it was a tall box, a king size, so the Micronite  
24 phrase continued.  
25 Let me ask you, Doctor -- page 149, Your Honor, line  
26 21 through line 4 on the will following page -- if you  
27 remember this question and this answer from the  
deposition.  
28 (Portion of videotape deposition being played.)  
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1 MR. OHLEMEYER: Q. And Doctor, at the deposition  
2 you told us again that you smoked about a pack a day, no  
3 more; is that right?  
4 A. That's correct.  
5 Q. And that you quit smoking cigarettes at or about the  
6 time the Surgeon General report on smoking and health --  
7 A. I didn't associate that, necessarily, with the  
Surgeon  
8 General's report. I know that my quitting occurred in the  
9 beginning of 1963, and the Surgeon General's report could  
10 have been later or earlier. I wasn't sure.  
11 Q. Doctor, let me ask you if you remember this question  
12 and this answer from your deposition at page 146, line 1.  
13 "And you smoked Kent cigarettes until you quit  
smoking  
14 cigarettes entirely?"  
15 Your answer was: "Correct."  
16 And the question at line 15: "Did you quit smoking  
17 before or after the Surgeon General's report which  
discussed  
18 smoking and its relationship to cancer?"  
19 And your answer was: "I quit smoking New Years'  
20 weekend in '63. I think the Surgeon General's report was  
21 either '62 or '63, something like that, so I'm not  
22 altogether sure."  
23 And my question then was: "So your best  
recollection  
24 is you quit smoking at or near the time the Surgeon  
25 General's report came out?"  
26 And your answer was: "Yeah."  
27 MS. CHABER: No, Your Honor, there's a remainder of  
an  
28 answer that should be --  
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1 MR. OHLEMEYER: I'll read it, Counsel.

2 "Yeah. There had been some stuff in the press about  
3 it back in the early '60s, and I remember when I was in  
4 Berkeley that year, '61-'62, there was a lot of discussion  
5 about it with my professional colleagues and friends.

6 THE WITNESS: That's right, but I wasn't saying it  
7 being the Surgeon General's report, but the dangers  
8 associated with smoking. It could be that it was in '64.

I  
9 just don't know the date of the Surgeon General's report,  
10 and I made it clear in qualifying my answer that I wasn't  
11 sure.

12 MR. OHLEMEYER: Q. Now, Doctor, when you smoked  
Kent

13 cigarettes, during the time you smoked Kent cigarettes,  
the  
14 only changes that you could recall were the blue filter  
15 changing to white, some changes in the packaging, the  
color  
16 of the packaging?

17 A. It seemed to change a little, yeah.

18 Q. You don't recall any changes in the taste or flavor  
of  
19 the cigarette?

20 A. I think I said that the drawing was easier, I could  
21 inhale more easily, although that wasn't that conspicuous.

22 Q. And you don't recall the price going down during the  
23 time you smoked?

24 A. No, I don't recall anything about the price, no.

25 Q. Now, Doctor, your diagnosis, your current illness  
has  
26 obviously caused you some anxiety and some distraction?

27 A. Correct.

28 Q. And in the past, you've studied things like memory  
and

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1 recollection, haven't you?

2 A. Yes.

3 Q. And, in fact, you wrote a paper on it on judging  
4 intelligence in action that was published back when you  
were

5 in Cleveland?

6 A. Right.

7 Q. And in that paper you said, and will you agree with  
8 me, that the process of recall is clearly affected by  
9 anxiety and other distractions?

10 A. Uh-huh.

11 Q. And you've also studied the role that hindsight  
plays

12 in people's abilities to recall things?

13 A. Uh-huh.

14 Q. And you've studied the role it plays in the way  
people

15 fill in gaps in their memory?

16 A. Yes. You mentioned this to me last time at the  
17 deposition, right.

18 Q. And at the deposition, you defined hindsight for me  
as  
19 being able to look back after an event occurs and using  
20 today's knowledge to determine why something happened?

21 A. Uh-huh.  
22 Q. Now, finally, Doctor, you've told us that one of the  
23 reasons you connect -- one of the things you remember  
about  
24 the cigarette filter being blue was it was the color of  
your  
25 father's eyes?  
26 A. Correct.  
27 Q. Did your father have brown eyes?  
28 A. No.

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1 Q. Was your father's name Isadore Horowitz?  
2 A. Right.  
3 Q. And he was a grocer?  
4 A. Right.  
5 Q. And he lived in New York?  
6 A. Right.  
7 Q. Came to this country from Austria?  
8 A. Right.  
9 Q. Your mother's name was Tessie?  
10 A. Right.  
11 Q. And she came to this country from Poland?  
12 A. Right.  
13 Q. And there came a time when your father became a  
United  
14 States citizen?  
15 A. Correct.  
16 Q. And your birthday is July 24th, 1923?  
17 A. Right.  
18 Q. And you lived in Brooklyn with your parents?  
19 A. Right.  
20 MR. OHLEMEYER: I want to mark this next in order,  
21 Your Honor.  
22 MS. CHABER: May I see it first?  
23 MR. OHLEMEYER: Sure.  
24 THE CLERK: Defendants' Exhibit G marked for  
25 identification.  
26 (Defendants' Exhibit G marked for identification.)  
27 MR. OHLEMEYER: Q. Doctor, let me hand you what  
I've  
28 marked as Defendants' Exhibit G, and let me ask you, is  
that

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1 your father's signature?  
2 A. Yes.  
3 Q. And this is a declaration of intention to become a  
4 citizen? Is that the title on it?  
5 A. Yes.  
6 Q. And attached to it is a petition for naturalization?  
7 A. Petition for naturalization. Okay.  
8 Q. And on the first page is where your father's  
signature  
9 is?  
10 A. Yes.  
11 Q. Right up there about the fourth line down, doesn't  
it  
12 say that the color of his eyes is brown?  
13 A. That's what it says. But that's not true. What it  
14 says was just not true. The man had blue eyes. I have

blue

15 eyes, my sister has blue eyes, and the color of blue has  
run  
16 through this family for generations. And I don't know who  
17 got this information or how it was put down, or I just  
don't  
18 know that, but there's no question that this is  
inaccurate.

19 I mean, period. What do we do with that? Are you telling  
20 me that my father had brown eyes?

21 Q. All I'm telling you is that's what it says in this  
22 petition.

23 A. That's wrong; pure and simple, totally wrong.

24 MR. OHLEMEYER: That's all I have, Your Honor. I  
move

25 G into evidence.

26 THE WITNESS: That's ridiculous.

27 MS. CHABER: I would object to moving it into  
evidence

28 as a hearsay document, Your Honor.

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1 THE WITNESS: I mean, gee, do you know what people  
who  
2 came to this country --

3 THE COURT: Wait until there's a question.  
4 It may be admitted.

5 (Defendants' Exhibit G received in evidence.)

6 MS. CHABER: It's not even certified, Your Honor.

7 MR. OHLEMEYER: Yes it is.

8 MS. CHABER: Not the one you gave me.

9 THE WITNESS: That's ridiculous. Are you trying to  
10 tell me what my father's eyes were?

11 CROSS-EXAMINATION BY MR. BRAKE

12 MR. BRAKE: Q. Doctor, I just have a couple of  
13 questions for you. My name is Stephen Brake, Doctor.

14 Four years after you began smoking Kent cigarettes,  
15 the filter became white? Is that your testimony?

16 A. So I recall, yes.

17 MR. BRAKE: If I could have this marked for  
18 identification.

19 THE CLERK: Defendants' Exhibit H marked for  
20 identification.

21 (Defendants' Exhibit H marked for identification.)

22 MR. BRAKE: Q. Doctor, let me show you, if I  
could.

23 The cigarette that you told us you smoked was porous, had  
an  
24 porous-type filter?

25 A. Yes.

26 Q. Was that this cigarette in the middle?

27 A. That certainly looks like it.

28 Q. That was your blue cigarette, had the blue filter  
like

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1 your father's eyes; right?

2 A. Uh-huh.

3 Q. You smoked those for four years?

4 A. Right.

5 Q. And the one in the middle, right, Doctor?

6 A. Right.  
7 MS. CHABER: Are you moving that into evidence?  
8 MR. BRAKE: If you wish.  
9 MS. CHABER: I think if he's going to display it.  
10 MR. BRAKE: Q. Doctor, then you had a white  
filter;  
11 is that correct?  
12 A. Well, I can't tell you that what you've just pointed  
13 to looks like the filter cigarette and the white one. I  
14 don't know what the white filter cigarette looked like. I  
15 mean, I didn't pay attention to it like I did to the blue  
16 one.  
17 Q. This is white, right? You would agree with me?  
18 A. Compared to the blue, right.  
19 Q. Now, when you noticed the cigarette go to the white  
20 filter, you didn't notice any difference in the porosity;  
is  
21 that what you told us?  
22 A. That's what I'm saying. That is, I did not  
23 investigate the porosity in relation to the way it used to  
24 be, no, I did not. I remember the blue with the porosity.  
25 I don't remember what the white looked like.  
26 Q. Well, when the change goes from blue to white, you  
27 don't remember any difference in porosity?  
28 A. I don't remember that I paid any attention to the

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1 difference in porosity, and I don't know whether it was  
2 different in porosity or not. I just don't recall that I  
3 paid attention to it.  
4 Q. Now, with respect to the exhibit that just went in  
5 evidence with regard to your father's declaration of  
6 intention to become a citizen --  
7 A. Yes.  
8 Q. -- would you agree with me that your father, putting  
9 his personal particulars down in connection with becoming a  
10 United States citizen, would have wanted to get those  
11 correct?  
12 A. My father would not have done this because he could  
13 not write English at the time. And whatever was done was  
14 done by somebody else who listened in some way, or else  
had  
15 the impression that his eyes were one color or another  
16 through what they thought they saw, but he could not  
write.  
17 Even in his older years he had trouble writing English, so  
18 he could write other languages, but not English, and I  
doubt  
19 very much that he put anything down in filling out an  
20 application. He was not educated.  
21 Q. Do you have the document in front of you?  
22 A. Yes, I do.  
23 A. I mean, you hear what I'm saying, if I may be  
24 permitted, for a moment. He could not read what he had  
25 signed. This is what many naturalized people went  
through.  
26 I knew it from other members of my family. They just were  
27 uneducated in English and were told what they were  
signing,  
28 maybe, and signed it. But he couldn't see what he was

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1 signing.

2 Q. Doctor, your father was a grocer, that's correct?

3 A. Yes, he was a grocer, yes.

4 Q. His color of hair was brown?

5 A. The color hair was brown, right, like mine used to  
be,

6 right.

7 Q. The country from which he emigrated is correctly  
8 listed?

9 A. Yes, it was from Austria; correct.

10 Q. In fact, the case is, Doctor, everything on here --  
I

11 understand you've taken issue with the eye color, but  
every

12 other particular listed here is correct?

13 A. He was more than five feet five inches, what that  
14 says. His color was white, his complexion was fair, hair  
15 was brown. What does it say the weight was? I can't read  
16 that. 155, or something? The brown hair, but the eyes  
were

17 certainly not brown. Somebody had the fantasy that his  
eyes

18 were brown.

19 Yes, there were no other distinctive marks. He came  
20 from Huslatyn, which is a suburb of Poland. Actually,  
21 Galicia was both in Poland and Austria, in the old days,  
and

22 still controversial to where it belonged. He lived on  
23 Watkin Street in Brooklyn. The ship he came across on

Graf

24 Waldersee, and wife is Tessie, that's right, that was my  
25 mother. Yeah, okay.

26 Q. So it's all correct, but you disagree with the eye  
27 color?

28 A. Absolutely. Oh, totally.

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1 MR. BRAKE: Thank you, Doctor. That's all.

2 REDIRECT EXAMINATION BY MS. CHABER

3 MS. CHABER: Q. Dr. Horowitz, what color was your  
4 father's eyes?

5 A. Blue. Absolutely, totally, unmistakably blue.

6 Q. And you said that your father didn't write English?

7 A. No.

8 MR. OHLEMEYER: Objection, Your Honor, it's leading.

9 THE COURT: That's all right, but don't do it  
anymore,

10 please.

11 MS. CHABER: Q. What languages did he write?

12 A. He wrote Polish, he could write German, he wrote  
13 Yiddish, but he couldn't write English. He hardly spoke  
in

14 English. He ultimately learned English. As a grocer, he  
15 picked up the language with the people around him, but at  
16 home, he spoke Yiddish all the time.

17 Q. When he read, what language did he read in?

18 A. He read the Yiddish papers, the Daily Forwards in  
New

19 York, which is a Jewish paper, he read that.

20 Q. Did he read the English papers?

21 A. He'd look at the New York Daily News mostly for the

22 pictures, but he didn't read the stories. He couldn't.  
23 Because when I was eight years of age, I would read it to  
24 him, and he was very proud of me to read English. And he  
25 said, "You're going to do well in this country because you  
26 can read."

27 MS. CHABER: I don't have anything further.

28 THE COURT: Any other questions?

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1 MR. OHLEMEYER: No, Your Honor.

2 THE COURT: Any member of the jury have a question?  
3 Apparently not, Doctor. Thank you very much. You may be  
4 excused.

5 MR. OHLEMEYER: If H hasn't been moved into evidence,  
6 I would move it.

7 THE COURT: Do you want that in evidence?

8 MR. BRAKE: Sure.

9 THE COURT: All right.

10 (Defendants' Exhibit H received in evidence.)

11 MS. CHABER: Your Honor, could we see you at sidebar  
12 for a moment?

13 THE COURT: All right.

14 (Sidebar conference.)

15 (Discussion off the record.)

16 MS. CHABER: At this time, Your Honor, the plaintiff  
17 would call to the stand Shirley Horowitz.

18 THE CLERK: Please raise your right hand.

19 SHIRLEY HOROWITZ,  
20 having been called as a witness on behalf of herself, was  
21 duly sworn and testified upon her oath as follows:

22 THE CLERK: Please state your name and spell your  
name

23 for the record.

24 THE WITNESS: Shirley Horowitz, S-h-i-r-l-e-y,  
25 H-o-r-o-w-i-t-z.

26 DIRECT EXAMINATION BY MS. CHABER

27 MS. CHABER: Q. Mrs. Horowitz, the first question I  
28 want to ask you is: Did you know your husband's father?

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1 A. Yes.

2 Q. And how old were you when you met him?

3 A. I was about 19 or 20.

4 Q. And do you know what color eyes he had?

5 A. He had blue eyes.

6 Q. Mrs. Horowitz, how old are you?

7 A. I'm 69.

8 Q. And how long have you and Mike been married?

9 A. 48 years.

10 Q. And was there ever any time that you two were  
11 separated?

12 A. No.

13 Q. When you first got married, where were you living?  
14 What city?

15 A. We got married in Brooklyn, New York, and  
immediately

16 moved to Topeka, Kansas after the marriage.

17 Q. And was that when your husband was in school there?

18 A. Right, AT Meninger's, and KU, Kansas University.

19 Q. And then from there, did you move to Cleveland?

20 A. Right.

21 Q. Did you go with your husband immediately to  
Cleveland  
22 from Kansas?  
23 A. I stayed over at my mother's house for a few weeks  
or  
24 months, I don't recall just when, before he was able to  
find  
25 a house, and we agreed on the house when I saw it after a  
26 trip to Cleveland, and then we moved the household to  
27 Cleveland.  
28 Q. And how many children did you have at that time?  
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1 A. Two.  
2 Q. And which children were those?  
3 A. Steve and Sherry.  
4 Q. And what year was Steven born in?  
5 A. '49.  
6 Q. And Sherry was born in what year?  
7 A. '50, 15 months apart.  
8 Q. When you lived in Kansas, did you smoke?  
9 A. Yes.  
10 Q. And what did you smoke?  
11 A. I smoked whatever was in the house, which was  
usually  
12 Chesterfield.  
13 Q. And then when you moved to Cleveland, did you  
continue  
14 to smoke?  
15 A. Yes.  
16 Q. And what did you smoke when you lived in Cleveland?  
17 A. Kents.  
18 Q. Who bought the cigarettes in the house?  
19 A. I recall I usually bought cartons at the grocery  
when  
20 I went shopping.  
21 Q. Do you know what the price of the cigarettes you  
22 bought were?  
23 A. No. I didn't pay any attention to it. Mike liked  
the  
24 cigarettes. He wanted them, and I got them.  
25 Q. Did you ever talk to your husband about smoking Kent  
26 cigarettes?  
27 A. No.  
28 Q. Back in the 1950s, did smoking have the reputation  
it

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1 does today?  
2 A. No. It was a whole different world, and from the  
3 continuation of World War II and the use of cigarettes as a  
4 way of connecting with people and being patriotic for the  
5 boys to give them cigarettes, and so on. In the '50s, it  
6 carried over, and there was a comradery with the  
cigarettes,  
7 and there wasn't the sense that you were doing that much  
8 damage to yourself by smoking. And also, there wasn't the  
9 questioning of the written word and advertising as there  
can  
10 be today.  
11 Q. Did you see advertising for Kent?

12 A. Yes.  
13 Q. What, if anything, do you recall about the  
14 representations in the advertising for Kent?  
15 MR. OHLEMEYER: Objection, Your Honor, relevance.  
The  
16 ads speak for themselves.  
17 THE COURT: Sustained.  
18 MS. CHABER: Your Honor, this goes to issues of  
19 representation, which are issues in this case.  
20 THE COURT: All right, then, go ahead, ask it.  
21 MR. OHLEMEYER: Same objection, Your Honor.  
22 THE COURT: Overruled.  
23 MS. CHABER: Q. What representations, if any, did  
you  
24 feel that the ads were making?  
25 A. That the Kent cigarette had a cleaner smoke; they  
26 were -- they would filter out anything that was injurious.  
27 They had a better smoke and that it was fun to smoke  
28 something like that.

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1 Q. And did you believe those representations?  
2 A. I did.  
3 Q. When you would go to parties and social events, were  
4 people smoking?  
5 A. Yes.  
6 Q. And your husband testified that there was a poker  
game  
7 that he was involved in back in Cleveland?  
8 A. Yes.  
9 Q. And would those games be at your house?  
10 A. Yes, from time to time.  
11 Q. And were you a social hostess to those games?  
12 A. No, I would lay out what was going to be used and  
13 disappear. That was my role.  
14 Q. And what would you lay out?  
15 A. I believe I would often put cigarettes and M & Ms or  
16 nuts, or things like that, drinks.  
17 Q. And if you put out cigarettes, what cigarettes would  
18 you put out?  
19 A. Kents.  
20 Q. Was there any other brand of cigarette smoked in  
your  
21 household while you were living in Cleveland?  
22 A. No, not to any degree, unless somebody brought in a  
23 pack from -- you know, that had something else that they  
24 were smoking, but we didn't smoke anything else.  
25 Q. Did you pay any attention to what other people were  
26 smoking?  
27 A. Not really.  
28 Q. If I asked you in 1953 if you knew what brands of  
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1 cigarettes were on the market besides Kents, would you be  
2 able to tell me?  
3 A. I don't have as good a memory for dates and times as  
4 my husband does, and I don't always attach time with a  
5 specific event or product, so I know about some of the  
6 cigarette names, but I couldn't identify when they came on  
7 the market or not.  
8 Q. Who quit smoking first, you or your husband?

9 A. I did.  
10 Q. And why did you quit smoking?  
11 A. I realized that there was a connection between my  
12 migraine headaches, that I had for many years, and either  
13 smoking myself or being in a smoke-filled room, and so I  
14 stopped smoking, and that was one reason.  
15 The other reason is I felt that I didn't want my  
16 children to start smoking, because I was more aware of  
some  
17 of the problems of smoking, and I felt that the best way  
to  
18 influence children was by being a model for them and by  
19 stopping smoking.  
20 Q. And do you know when your husband quit smoking?  
21 A. He stopped after we got back from Berkeley. I  
wasn't  
22 clear about just when he stopped, as far as the date is  
23 concerned.  
24 Q. You moved to California in 1964?  
25 A. Yes.  
26 Q. When you moved to California, did either you or your  
27 husband smoke?  
28 A. No.

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1 Q. The time period that you were in Cleveland, did you  
go  
2 to your husband's job site?  
3 A. I would just go there to pick him up when I had the  
4 car for the day and he would go in in a carpool with  
5 somebody else, and then I'd do errands and pick him up at  
6 the office in the evening to bring him home.  
7 Q. Do you have any memory of any construction work going  
8 on there?  
9 A. When I got there, it was ended for the day, so I  
10 remember the barricades and the construction as it was  
going  
11 up, but I don't believe I was there when any of the  
12 construction was actually being done.  
13 Q. And in Los Angeles at the Reiss Davis Center, was  
14 there -- did you ever go to your husband's job site there?  
15 A. Just a few times. We lived nearby, and so there was  
16 not any occasion for me to call for him or to be there,  
17 except if there was a particular celebration of some kind.  
18 Q. There was some asbestos that you had removed from  
your  
19 house in Los Angeles?  
20 A. Yes. We were away for a week on vacation, and when  
we  
21 got back, the house was flooded and --  
22 Q. What was?  
23 A. Flooded.  
24 Q. From rains?  
25 A. The washing machine, the hose had broken, and it was  
26 constantly pouring water that went down the basement and  
27 filled the basement and went up to the area where the  
tubing  
28 was with asbestos, and the layers of asbestos covering the

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1 ducts was loose and lying about, when we were able to get

2 out some of the water, and so there was no alternative, we  
3 had to remove the asbestos, because it was in a heap, and  
so  
4 we -- we had the place rehabilitated and new ducts put in  
5 and wrapped with something else.  
6 Q. How big a room is this basement?  
7 A. It's very small. It's just for the furnace and hot  
8 water heater, but it has all the ducts going up to the rest  
9 of the house.  
10 Q. And was the asbestos around the outside of the ducts  
11 or on the inside of the ducts?  
12 A. The outside.  
13 Q. Was the basement an area that people spent time in  
or  
14 went to?  
15 A. No. It was little cement area with the rest being  
16 dirt, actually.  
17 Q. When did this happen that this flood occurred?  
18 A. It was around '87 or '88. I'm not clear.  
19 Q. And then you hired somebody to come out?  
20 A. Right.  
21 Q. And were you home when they did the work?  
22 A. I was home. They wrapped the whole place in plastic  
23 and used the approved method at the time of asbestos  
24 removal. It looked like something from outer space, and  
25 they wore special uniforms and disposed of the asbestos in  
a  
26 special way so that it was not spread around.  
27 Q. And did they report to you whether or not it had all  
28 been successfully removed?

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1 A. Yes. They took a reading and they said it was fine.  
2 Q. Your husband was not home during that time?  
3 A. Not during the day. It actually took, I think, just  
4 one day, and he was at the office at that time.  
5 Q. Now, your husband was diagnosed with a colon cancer?  
6 A. Yes.  
7 Q. Did he fully recover from that, as far as you could  
8 tell?  
9 A. Yes, he had a complete recovery. The surgeon cut the  
10 area that had any kind of involvement in cancer, and it  
was  
11 in a place located so that there was no interference with  
12 elimination or having to cut into the skin for any other  
13 kind of procedure. So it was very successful.  
14 Q. And was he able to resume full-time activities after  
15 that?  
16 A. Yes.  
17 Q. In 1987, I think it was, he had a prostate cancer?  
18 A. Yes.  
19 Q. And he had surgery for that?  
20 A. Yes.  
21 Q. And after the surgery for that, was he able to  
resume  
22 full-time activity?  
23 A. Yes.  
24 Q. I take it that when he had the surgery and until he  
25 recovered, there was some effect on him from that?  
26 A. Oh, yes.  
27 Q. About how long did it take him to recover?  
28 A. He is a man who just doesn't let anything get him

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1 down, and I think his being able to resume his normal life  
2 as fast as possible has helped him through all of his  
3 illnesses, and it was an amazingly short time. I don't  
4 think it was more than ten days that he was back at work,  
if

5 that, after his surgery for prostate cancer.

6 Q. And you were diagnosed with breast cancer?

7 A. Yes.

8 Q. And did you have surgery as a result of that?

9 A. Yes.

10 Q. What time was this? When did that happen?

11 A. This was a year ago last April.

12 Q. And how soon after that was your husband diagnosed  
13 with mesothelioma?

14 A. Well, the following August was the time that they  
gave

15 us the diagnosis.

16 Q. Were you fully recovered at that point in time when  
he  
17 was diagnosed?

18 A. Well, pretty much, pretty much. I didn't have -- I  
19 had a mastectomy. I didn't have any radiation or  
20 chemotherapy, so the recovery was pretty fast, and I just  
21 didn't dwell on it too much. Before the August diagnosis,  
22 he had problems physically that I was concerned about and  
23 worried about.

24 Q. What kind of problems?

25 A. The problems in catching his breath and feeling that  
26 there was something wrong when he would breathe.

27 Q. When did that happen?

28 A. In -- let's see. It was around June that he had the  
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1 first time when the fluid was drained from the pleura, and  
2 he felt better after that. But from then on, there was --  
3 he had -- he was feeling better, and then the fluid  
4 returned, and from there on, in it was very worrisome, and  
5 he had finally the diagnosis in August.

6 Q. And through the course of his treatment for  
7 mesothelioma, have you been involved in that?

8 A. Oh, yes.

9 Q. Do you go to his appointments with him?

10 A. Yeah, it was hard for him to drive, and so I drove  
him

11 and stayed there, and it was much worse to see him suffer  
12 than any kind of pain that I had had in my cancer.

13 Q. And why was that? What do you mean by that?

14 A. It's much more difficult, I think, to see someone  
you

15 love in pain and feeling that you want to do something for  
16 them and suffering your own pain and feeling that you can,  
17 at least, do something for yourself, but not be able to  
stop

18 the pain and sadness about my husband.

19 Q. Now, you were here while your husband was  
testifying,

20 and I don't want to go over things that he's already  
21 described for the jury, but were there symptoms or side  
22 effects that he had as a result of the chemotherapy that

you

23 were able to witness that he didn't talk about?

24 A. Well, my husband is a very proud man, and as part of  
25 the results of the chemotherapy, he would occasionally  
have  
26 liquid leaking from his nose that he wasn't even aware of,  
27 and it was humiliating for him to have me hand him a  
28 handkerchief or tell him to wipe his nose. And in ways  
that

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1 I took on the role of mother, it was something that he  
2 fought and I was glad to see him fight, because it meant he  
3 had that energy. But it was very troublesome to both of  
us.

4 He got over that.

5 Q. Did he take medication after the chemotherapy  
session?

6 A. Well, he took therapy to help the nausea, and much of  
7 it just kind of made him either terribly sleepy or woozy,  
or

8 not really do the job of stopping the nausea, so it was  
9 mainly for the nausea that he took the medication.

10 Q. Were there any incidences that occurred as a result  
of  
11 him taking the antinausea medication?

12 A. He complained to the doctor that the medication that  
13 he was given was really not doing very much for his  
nausea,

14 so the doctor said, "Well, take them all together," which  
he  
15 did.

16 And he was downstairs and going upstairs to bed, and  
17 the stairs came up and hit him in the nose, and I found  
him

18 sprawled out on the stairs. And he had cut his nose and  
was

19 just, you know, very dizzy and not able to really function  
20 well. I helped him up the stairs and put him to bed, and  
he

21 said, "Next time I guess I'll take the medications and go  
22 right to bed so I won't fall."

23 Q. Did you have to take him to the emergency room on  
any  
24 occasions?

25 A. Yes, once I took him and once the paramedics took  
him.

26 Among the worst times was when he had fluid, this was  
before

27 the chemotherapy had started, and he had fluid in his  
lungs

28 or bronchials, and he just couldn't lie down. I could  
hear

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1 him sloshing as he turned around in bed, and he couldn't  
2 sleep, he was really beside himself on the one hand,  
because

3 of the inability to breathe, and also the terrible fear  
that

4 the mesothelioma was causing this and taking over.



5 And so I called the Doctor's office and was told to  
6 bring him into the emergency room at the hospital where he  
7 could be x-rayed and helped, and he was helped a lot. They  
8 found -- they diagnosed that he had a bad case of  
9 bronchitis, and gave him antibiotics and some breathing  
10 therapy that helped him a lot.

11 Q. Were you with him when you got the diagnosis of  
12 mesothelioma?

13 A. Yes.

14 Q. How did he react?

15 A. Well, he didn't quite know what to make of it,  
because  
16 of not knowing was bad, but knowing specifically we didn't  
17 really know what that meant, essentially. We didn't  
realize

18 how it was so rare and so deadly, that it took us a little  
19 while to find out about what could be done and what his  
20 chances are and how we could live with this knowledge.

21 Q. And how are you living with the knowledge?

22 A. Well, we are hanging on to his remission and feel  
that

23 that's a miracle and hoping that there will be more  
miracles

24 to come, because he might have something that he's able to  
25 fight off the cancers with in some way and just trying to  
26 live as we can as long as we are both feeling okay.

27 MS. CHABER: Thank you. I have nothing further.

28 CROSS-EXAMINATION BY MR. OHLEMEYER  
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1 MR. OHLEMEYER: Q. Mrs. Horowitz, we met. I'm Bill  
2 Ohlemeyer.

3 A. Yes.

4 Q. I just have a couple questions. You moved to  
5 Cleveland in 1952?

6 A. Yes.

7 Q. How long did you live there?

8 A. Well, we lived there for 13 years. One year we lived  
9 in Berkeley.

10 Q. So until about 1964, '65?

11 A. '64.

12 Q. And I believe you told us you quit smoking before  
your

13 husband quit?

14 A. Yes.

15 Q. And you quit smoking before the Surgeon General's  
16 report?

17 A. Yes.

18 Q. And your husband quit smoking after the Surgeon  
19 General's report?

20 A. I'm not clear about when the Surgeon General's  
report

21 came out.

22 Q. Do you remember at your deposition, page 77, do you  
23 remember I asked you, at line 10 --

24 MS. CHABER: Can you wait, please.

25 MR. OHLEMEYER: Sorry.

26 Q. "Do you recall whether the Surgeon General's report,  
27 the government report on cigarette smoking, was released  
28 before or after you quit smoking?"

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1 Your answer was: "After."  
2 A. Well --  
3 Q. That's what you told us just now. And then my next  
4 question was --  
5 A. Wait a second. I'm sorry.  
6 Q. Let me ask you again. Did you quit smoking before or  
7 after the Surgeon General's report or after?  
8 A. Before.  
9 Q. And the question I asked you at the deposition was if  
10 the Surgeon General's report come out before or after you  
11 quit, and your answer was after.  
12 A. Right.  
13 Q. And then I asked you: "What about your husband, was  
14 it before or after he quit smoking?"  
15 And your answer was: "I think it was before."  
16 A. I just don't remember. There was much more talk  
about  
17 it, and I don't remember whether that talk was -- because  
we  
18 were in a medical setting, this was knowledge even before  
19 the Surgeon General's report was out, and that only  
20 confirmed it. And I just don't recall exactly when it was  
21 that he stopped smoking.  
22 Q. The Foxmans were a couple that you met in Topeka?  
23 A. Yes.  
24 Q. At some point, Mr. Foxman went in the Army?  
25 A. Yes.  
26 Q. And then you moved from Topeka to Cleveland?  
27 A. Uh-huh.  
28 Q. And then at some point, you realized the Foxmans had  
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1 moved to Cleveland because you ran into Mrs. Foxman?  
2 A. Right.  
3 Q. And that happened about six years after you moved to  
4 Cleveland?  
5 A. No, I initially said it was six years. But in the  
6 amended corrections, I said two years. I am not good on  
7 dates, and I remembered an event that happened when I saw  
8 Anita Foxman with her son, who looked exactly like her  
9 husband. She was holding a little Elliott. .  
10 And so I, in my memory, I thought that that was the  
11 first time that I saw her, but actually, she contacted me  
12 earlier than that when they moved to Cleveland, because  
she  
13 wanted a pediatrician and an obstetrician for herself and  
14 wanted to know who I was using. And that was in around  
'54.  
15 Q. Do you remember page 35, Counsel, line 16, we were  
16 talking about the Foxmans at your deposition?  
17 A. Uh-huh.  
18 Q. And I asked you: "How long, after you had moved to  
19 Cleveland, did you run into Mrs. Foxman?" And your answer  
20 was: "Let me think now. It was about six years."  
21 A. That's what I said, but I've corrected it.  
22 Q. Thank you Mrs. Horowitz.  
23 A. Okay.  
24 CROSS-EXAMINATION BY MR. BRAKE  
25 MR. BRAKE: Q. Just one thing which, I'll ask from  
26 over here.  
27 Mrs. Horowitz, I just wanted to make one thing

clear.

28 You're not able to tell us when it was that your husband  
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1 stopped smoking Chesterfields and started smoking Kents;  
2 right?

3 A. I know that we smoked Chesterfields in Topeka and we  
4 smoked Kents in Cleveland, and beyond that, I don't recall  
5 the exact dates or specifics.

6 Q. You don't recall the specifics of when your husband  
7 started smoking Kents?

8 A. Right.

9 Q. Thank you.

10 REDIRECT EXAMINATION BY MS. CHABER

11 MS. CHABER: Q. Mrs. Horowitz, have you talked to  
12 Mrs. Foxman about when you actually met each other again  
--

13 A. Yes.

14 Q. -- in Cleveland?

15 A. Yes.

16 Q. And is that why you changed the answer that you'd  
17 given in the deposition?

18 A. Yes.

19 MR. OHLEMEYER: Objection, Your Honor. It can only  
20 call for hearsay.

21 THE COURT: I think she can explain why she changed  
22 it.

23 MS. CHABER: Q. And Mrs. Horowitz, do you have a  
24 particular reputation in your family with respect to  
dates?

25 A. Not only dates, but numbers of any kind. I'm not  
very

26 good at it.

27 Q. Is that what your reputation is?

28 A. Yes.

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1 MS. CHABER: I don't have anything further.

2 MR. OHLEMEYER: Nothing, Your Honor.

3 THE COURT: Any member of the jury have a question?  
4 Apparently not, Mrs. Horowitz. Thank you very much. You  
5 may be excused.

6 We will take the evening recess at this time, ladies  
7 and gentlemen. Please keep in mind the admonition given to  
8 you before that you're not to form an opinion about the  
9 case, you are not to do any research on it or look anything  
10 up anywhere or talk to anybody about it. If anyone  
attempts

11 to discuss the case with you in any way, please advise the  
12 Court of that fact. Return tomorrow morning at 9:00  
o'clock

13 please. See you then.

14 (In open court outside the presence of the jury.)

15 THE COURT: I have a note from the jury. They want  
to

16 know how Mrs. Horowitz can be testifying if she was in the  
17 courtroom. Is that because she's a plaintiff, also.

18 MS. CHABER: Your Honor, could I ask a question on  
19 both this and the last question. The other question that  
20 was asked that the Court reported to us in chambers dealt  
21 with why the lawsuit being filed here. I never heard --

22 THE COURT: I haven't told them. I haven't said  
23 anything.  
24 MS. CHABER: I understand that the Court is going to  
25 say something in response to both of them?  
26 THE COURT: Yes, I'll answer both of them.  
27 MS. CHABER: The thing --  
28 THE COURT: We didn't exclude witnesses, I don't  
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1 believe, anyway. There was no such order.  
2 MR. OHLEMEYER: They are parties.  
3 THE COURT: I know, but I don't think there's been an  
4 exclusionary order requested or made.  
5 MR. OHLEMEYER: There aren't any fact witnesses.  
6 MS. CHABER: There was when another defendant was  
7 here, and I've been following that with respect to other  
8 witnesses.  
9 THE COURT: You had something else?  
10 MS. CHABER: Yes, I had another matter that I wanted  
11 to raise.  
12 As the Court's aware, there is another or there has  
13 been another case being tried in this courthouse regarding  
14 these same defendants. Counsel from that case have been  
15 in  
16 and out of this courtroom earlier on. Mr. Brake  
17 introduced  
18 Mr. McElaney to the jury. He was --  
19 MR. BRAKE: In the opening statement, is that what  
20 you're talking about?  
21 MS. CHABER: Yes, introduced them. In other words,  
22 those people have been around. I am very concerned that  
23 this jury not be tainted by any publicity with respect to  
24 that case, and I would ask this Court to issue a gag order  
25 on the lawyers for Lorillard and Hollingsworth and Vose to  
26 not deal with the press on that case until the conclusion  
27 of  
28 this case. Its the same lawyers who are involved here,  
Your  
Honor.  
MR. OHLEMEYER: The jury, Your Honor --  
MS. CHABER: And I'm sure they would be asking for  
the

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1 same thing with respect if there had been a plaintiffs'  
2 verdict. Apparently, the jury found that there was a  
3 defect, but found that it wasn't a cause of injury.  
4 MR. OHLEMEYER: Your Honor, I'm not -- I'm not going  
5 to walk out tonight and step in front of two microphones  
6 and  
7 have a press conference. I've got partners who are in  
8 Kansas City, I've got partners in California. I don't know  
9 who's going to say what to whom, or who may get asked about  
10 that.  
11 We typically do not say much about anything in the  
12 press. I'd rather try a case in the courtroom. I don't  
13 think we need a gag order, I think the jury gets  
14 admonished  
15 to not read about this or other cases. All I'm saying is  
16 don't want to be in violation of something that I have no  
17 control over from San Francisco.

16 MS. CHABER: They do have control.  
17 THE COURT: All she's saying is that you not say  
18 anything, and you're telling me you won't.  
19 MS. CHABER: No, I'm not saying just them  
personally.  
20 THE COURT: I can't gag somebody else.  
21 MS. CHABER: It's the same law firms, the same  
lawyers  
22 that are involved in this.  
23 THE COURT: They are not before me and I can't do  
24 anything about it.  
25 MS. CHABER: They are going to be. I was told that  
26 they were joining this case and they are going to be  
coming  
27 in here. And if Mr. McElaney is quoted in the paper  
saying,  
28 you know, see, this stuff couldn't possibly cause  
anybody's

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1 injury, that is going to taint and could potentially taint  
2 this jury.  
3 And it's the kind of thing I would have to come in  
4 here potentially and ask for a mistrial, and I could  
5 guarantee this court even though that's another plaintiffs'  
6 law firm that's not even related to mine, that they'd be  
7 asking for the same thing if it was a plaintiffs' verdict.  
8 THE COURT: Well, I'll just admonish them not to  
talk,  
9 and don't let any of your employees. And I would tell your  
10 cohorts in your firm that we've issued it. I'm sure that  
11 you don't want this a mistrial to result here.  
12 MR. OHLEMEYER: And I appreciate that. If you make  
an  
13 order, I can't -- how can I enforce it? Somebody may have  
14 already said something.  
15 THE COURT: I understand that. All I'm saying is  
you  
16 not do it.  
17 MR. OHLEMEYER: I won't.  
18 THE COURT: And you tell your colleagues or  
associates  
19 that that order has been made here, and we would  
appreciate  
20 it if they didn't do anything that will mar or interfere  
21 with the deliberation in this case.  
22 MR. OHLEMEYER: That's fine. But what I don't want  
to  
23 have happen is two days from now, counsel come in here and  
24 say somebody said something to somebody that violated your  
25 orders and entitles her to a mistrial. I don't want to  
26 set --  
27 THE COURT: You've heard what I've said, and all I'm  
28 asking for is a gag reasonably and sensibly to protect  
this

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1 case to the best of your ability, and you can do a lot of  
2 things or not do a lot of things. Don't do them. Protect  
3 it. Let's get this trial over with for the benefit of not  
4 only you, but all the parties, the witnesses involved.

5 Nobody wants to come back and try it over.  
6 MR. BRAKE: These cases don't get the press  
attention.  
7 THE COURT: Of course they don't. Something could  
8 happen.  
9 MR. BRAKE: We will.  
10 THE COURT: I'm not going to admonish the jury not  
to  
11 read the papers about it because they will start searching  
12 for something.  
13 MS. CHABER: Exactly. That will highlight it.  
14 THE COURT: I've told you about the case that it  
15 happened that I was with and I think they searched and  
they  
16 found something.  
17 MR. BRAKE: I had one thing, Your Honor, and we can  
18 take it up in the morning, which relates to Mr. Foxman and  
19 the questions that were asked about was he sick.  
20 The jury heard three things. He used to go to poker  
21 games, he used to get smoke Kents, and now he might be too  
22 sick to come to San Francisco to testify, and then the  
23 objection was sustained.  
24 I think what I would request is a short instruction  
to  
25 the effect that there were questions about Mr. Foxman,  
that  
26 there's an issue for you to decide relating to whether  
he's  
27 well enough to travel to San Francisco, and I think the  
jury  
28 should know that his particular problem, which I  
understand

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1 is not in dispute, he has some heart conditions that may  
2 prevent him coming here, and it's your issue. I think a  
3 jury could infer that Mr. Foxman, having gone to some poker  
4 games and smoking some Kents, can't come to San Francisco.  
5 I'm not sure that's the purpose.  
6 MS. CHABER: I would have gone on and I would have  
7 said what: Problem does he have, and you objected. He has  
8 congestive heart failure and he passed out on the street in  
9 Portland.  
10 MR. BRAKE: Whether he's well enough to travel isn't  
a  
11 question for the jury.  
12 MS. CHABER: The jury has asked questions about why  
13 aren't witnesses here. He is in the state of California  
and  
14 I did not want the jury speculating again as to why  
15 witnesses aren't here.  
16 MR. BRAKE: I don't want to draw a lot of attention  
to  
17 it, but it was kind of a funny exchange and I'd like to  
18 clear it up.  
19 (Whereupon, court was in recess.)  
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REPORTER'S CERTIFICATE

I, JOANNE M. FARRELL, A Pro Tempore Court Reporter  
of the Superior Court of the City and County of San  
Francisco, State of California, do hereby certify that I  
correctly reported the within-entitled matter and that the  
foregoing is a full, true and correct transcription of my  
shorthand notes of the testimony and other oral proceedings  
had in the said matter.

Dated this 17th day of August 1995  
San Francisco, California

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JOANNE M. FARRELL, CSR# 4838